Supreme Court, U.S.
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No. 001275

In the
Supreme Court of the United States

JEFFERY PLUMMER,
Petitioner,

v.

ABB INDUSTRIAL SYSTEMS, INC.,
DOHN HAYWOOD, and DICK CANTER,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a male employee have to endure sexually harassing comments by male supervisors, explicit pornographic material allowed throughout the workplace, semen placed about his personal property by male supervisors among other similar conduct and when he complains about such is subjected to threats of termination and demotion and finally constructively discharged; wherein female employees do not have to endure such and are treated differently. What constitutes sufficient evidence and does this type of activity demonstrate sufficient evidence to constitute a triable same sex sexual discrimination claim under Title VII and this Court's Oncale decision.

PARTIES TO THE PROCEEDING

Petitioner

Jeffery Plummer is an individual and has no corporate affiliations.

Respondents

ABB Industrial Systems, Incorporated; Dohn Haywood and Dick Canter.

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The opinion of the United States Court of Appeals for the Sixth Circuit is not reported. A copy of the Opinion is included in the Appendix at Appendix A at la-2a. The opinion of the District Court granting Summary Judgment is unreported and is included at Appendix B at 3a-35a. The District Court ordered entry of the final judgment on October 13, 1999, which is printed in Appendix C at 36a-37a.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its Opinion denying Petitioner's Appeal, on November 9, 2000. (App. A at 1a-2a.)[1] This Petition for Writ of Certiorari is filed within 90 days of the denial of the Petitioner's Appeal. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 1000e et seq.

Civil Rights Act of 1991, 42 U.S.C. § 1481(a)

Ohio Revised Code § 4112.02

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[1] Citations to "App." are to the appendix filed with this Petition for Writ of Certiorari pursuant to Supreme Court Rule 14(i).

STATEMENT OF THE CASE

PORNOGRAPHIC PHOTOGRAPHS, MAGAZINES MATERIALS, HOSTILE AND ABUSIVE WORK ENVIRONMENT

Pornographic photographs and depictions were placed in Petitioner's personal tool box, file cabinet and desk drawer at Respondent ABB. Plummer believed the nude photos and depictions were placed there to harass him. Pornographic magazines and materials containing pictures of sexual acts were randomly available at work stations throughout the duration of Plummer's employment at ABB.

In 1993, Plummer, a team leader/supervisor at that time, complained to his Department Manager, Maurice Parsons, about pornographic pictures of nude women in the work areas, and the "Playboy" magazines that were read and viewed by third shift employees. This interfered with third shift employees' work. Plummer also told Parsons that he did not consider it appropriate to have this type of material in the work area.

Throughout his employment, Plummer saw pictures in the ABB facility of naked women. There were calendars hanging up between the lathes, including a naked woman calendar. There were pictures of naked women inside the cabinets which had to be accessed to obtain materials. There were also pictures of naked women and calendars hanging in the tool crib. The last time Plummer saw pictures of naked women hanging in the ABB facility was the day he was forced to quit, July 31, 1996.

Plummer found the obnoxious and degrading pornographic depictions and photographs in his toolbox, file

cabinet and desk drawer as well as throughout the ABB facility. Semen and a note stating "dick cheese" were placed on Plummer's toolbox by ABB supervisory personnel among other similar degrading actions taken against Plummer. (App. F at 41a-42a). Also, see Appendix D for representative samples of the type of pornography that Mr. Plummer had to put up with in his work environment. (App. D at 38a.)

Plummer concluded that the pornographic materials, semen and degrading note were placed in and on his personal property to harass him.

Respondent Haywood confirmed that pornographic materials or pictures of females or thinly clad females were present throughout his thirteen (13) years (1986 through 1999) of employment with ABB. In 1992, ABB employee Melinda L. Hoyle filed a complaint with the Ohio Civil rights Commission alleging sexually explicit and offensive posters, calendars and post cards in the work areas and offices.

Fellow employees Dohn Haywood and Don Hustead inquired about Petitioner's sexual orientation. Haywood asked Plummer directly if he were gay. In 1993, Haywood and Hustead inquired as to why Plummer was thirty (30) years old, never married, and had no kids, another implication of Mr. Plummer's assumed sexual preference.

Petitioner's sexuality was questioned by his ABB supervisors on various occasions. When he told the Process Owner, Maurice Parsons, about this, Parsons told him not to make a big deal of it.

Respondent Haywood admitted drawing concentric circles and labeling them "Tits" on the computer used by Mr. Plummer. This was done in August, 1995. (App. E at 39a.)

Haywood admitted that this drawing could be a picture of female breasts.

Plummer found the "Tits" drawing offensive, demeaning and harassing and intended as another hostile and demeaning way of questioning his sexuality. When he went to his supervisors and department manager (process owner) in August and September, 1995 and complained about the "Tits" drawing as demeaning and harassing and about the pornography in the work environment, he was told he was overreacting and nothing was done. He then used the company's "Open Door Policy" and went over his supervisor's and manager's heads and went directly to the Human Resources Department. No females that complained about sexually related material or harassment had to go through all these steps. Once they complained, regardless of the situation, it was handled immediately at the original complaint level.

HARASSMENT AND RETALIATION

After Mr. Plummer used the ABB Open Door Policy and complained to Human Resources in 1995 about the "Tits" drawing and file deletion, harassment and retaliation against Mr. Plummer escalated. For the first time, Plummer received a sub-par evaluation. George K. Morris, an ABB Vice President, criticized Plummer for even bringing the complaint. He remarked that Plummer was like a cow in Europe with mad cow disease and that Plummer needed to be killed or terminated, whether or not he had the disease. He stated that he was God in Plummer's world and that everything Plummer had was under Mr. Morris' control, and that Morris could control it with a stroke of a pen one way or the other.

Morris threatened to terminate Plummer after complaints by the ABB Human Resources Department about the "Tits" drawing were brought to Morris' attention. The threats were made at every meeting Plummer had with Morris, which included at least three (3) meetings prior to his constructive discharge. Every time the computer-generated drawing was discussed Morris raised the issue of getting rid of Plummer.[2]

Ken Morris stated to Mr. Plummer that if he ever mentioned Haywood's name again, Morris would fire him. In a meeting on July 30, 1996 Mike Sallows, threatened to terminate Plummer's employment, giving him five (5) reasons why he could fire Mr. Plummer on the spot. Instead, they were going to move Plummer out of the office as a programmer and back on third shift as just a machinist. This was a demotion they knew Mr. Plummer did not want. Plummer believing the reasons to be bogus, fed up with the continued harassment since his complaint and believing this was another attempt to get rid of him, could take it no longer and quit on July 31, 1996. This was the last straw.

The events leading up to Plummer's forced quit at ABB, were primary and serious stressors for Plummer. Plummer's treating psychologist, Deryck Richardson, Ph.D., opined that Plummer sustained a moderate to severe Major Depression as a result of the events leading to Plummer's constructive discharge.

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[2] Plummer was also harassed by his employer into returning to work sooner than he should have from a serious injury received in February 1996. He returned to work on March 25, 1996, sooner than the prescribed time for full recovery.

SUPERVISORY AUTHORITY, HARASSMENT AND RETALIATION

It was clear to Plummer as a result of having worked as a Team Leader/Supervisor, that Respondents Haywood and Canter as supervisor/team leaders had the authority to fire him. By virtue of his supervisory status, Respondent Canter was permitted to vote twice on Mr. Plummer's last "360 Review." Only supervisors and managers (process owners) were involved in such a manner.

In the review, which took place after Plummer's complaints regarding the "Tits" drawing, Plummer received his worst review as an ABB employee. The sub-par evaluation was in part due to Respondent Canter's involvement in seventy-five per cent (75%) of the score.

Canter's supervisory status is also demonstrated by his signing off on Respondent Dohn Haywood's review conducted in April, 1996.

Supervisory authority is also demonstrated by Canter's statement that there would be "strong repercussions" if Plummer went over Canter's head (regarding the "Tits" drawing and other complaints). One repercussion was that Canter designed Plummer's "360 Review" to Plummer's disadvantage, by conveniently assigning as participants in Mr. Plummer's review three (3) individuals who were biased against Plummer, namely, Respondent Dick Canter, Respondent Dohn Haywood, and Don Hustead. Hustead and Haywood had been involved in the computer-generated "Tits" drawing.

Respondent Canter threatened to terminate Plummer in August, 1995, when Plummer went to him about the "Tits" drawings at that time.

It was Canter who gave Plummer permission to work overtime and who, in fact, asked him to do so. Team Leaders had the authority to have substantial input into hiring and firing decisions.

Canter was clearly a supervisor when Plummer told him about the "Tits" drawing, during the period Plummer received his last evaluation, and leading up to his discharge, because Canter was filling in for the Process Owner who was a manager, namely, Maurice Parsons. This meant Canter became the "direct report" to the Vice President of Manufacturing.

In 1990 Dohn Haywood was a third shift Team Leader for eight (8) or nine (9) months, and also served as Team Leader at several different times between 1990 and 1996.

Both Canter and Haywood were involved in the determination of pay increases and decreases, just as Plummer had been when he was a Team Leader. When Plummer was a Team Leader (Supervisor), he had the authority for substantial impact in hiring and firing decisions.

As a supervisor on first, second and third shifts, Haywood's input was involved in hiring and firing decisions.

Haywood, when he was not a Team Leader, took his problems to Team Leaders. Problems were sometimes resolved at the Team Leader level, and if not, the Process Owner would be consulted. Complaints could be initially raised with the team leader.

Team leaders also had authority to send employees home when they engaged in inappropriate conduct, as evidenced by Petitioner having ordered such when he was a Team Leader.

Based upon all of the above, Petitioner Jeffery L. Plummer brought causes of action for same sex sexual discrimination (harassment), wrongful discharge, negligent supervision, and negligent and/or intentional infliction of emotional distress against his former employer Respondent ABB Industrial Systems, Inc. and his supervisors, Respondents Dohn Haywood and Dick Canter, in his complaint filed May 1, 1998.

Respondent filed a Motion For Summary Judgment. Petitioner responded to Respondents' Motion and a reply was filed.

On October 13, 1999, the Federal District Court granted Respondents' Motion For Summary Judgment. (App B at 3a-35a.)

Petitioner, filed a Notice of Appeal with the Sixth Circuit Court of Appeals from the lower Court's judgment and on November 9, 2000 the Sixth Circuit adopted and upheld the District Court's Summary Judgment decision. (App. A at 1a-2a.)

REASONS FOR GRANTING WRIT

I. The Issue Of The Sufficiency Of Evidence And The Circumstances Under Which There Is Sufficient Evidence To Constitute A Triable Same Sex Sexual Harassment Claim Is An Important Constitutional

Question That Has Not Been, But Should Be Settled By This Court.

This is a same sex sexual harassment action. Although this Court in 1998 in Oncale v. Sundowner Offshore Services, Inc., 118 S. Ct. 998, 1003, (1998), made it clear that such claims are actionable, further guidance is now needed from this Court as to the circumstances under which an employer may be held liable for same sex sexual discrimination and harassment. There is little direct guidance from the Courts on this specific issue.

The Sixth Circuit Court of Appeals denied Petitioner's appeal and adopted the decision and reasoning of the District Court which granted Summary Judgment against Petitioner Plummer. (App. A at 1a-2a.)

Petitioner submits, however, that the District Court erred by failing to properly evaluate the evidence before it and apply the proper standards for determining whether the circumstances were sufficient to give rise to a triable case of same sex sexual discrimination. Petitioner submits that part of the reason for the failure of the District Court to allow this matter to proceed to trial was based upon the fact that there is little case law in this novel area of the law (same sex sexual discrimination and harassment), which has only been a recognized and actionable claim since 1998, upon which to decide whether sufficient evidence is presented to defeat Summary Judgment.

Because additional direction from this Court is required to enable the lower Courts to determine the sufficiency of evidence upon which to permit a same sex sexual harassment case to proceed to trial and because

Petitioner believes the evidence was sufficient in this matter, the instant Writ of Certiorari is requested.

A. The Evidence In This Matter Was Sufficient To Establish A Triable Issue Of Same Sex Sexual Harassment And The Lower Courts Erred In Not Permitting This Case To Proceed To Trial.

Same-sex harassment occurs and is actionable. Oncale v. Sundowner Offshore Services, Inc., 118 S.Ct. 998 (1998); Yeary v. Goodwill, 107 F.3d 443 (6th Cir. 1997). The elements developed to date to demonstrate same-sex sexual harassment were all satisfied in this matter: 1) the harassment complained of was because of sex; 2) the harasser is an unusual actor who discriminates against his or her own sex; 3) the employee was subjected to unwelcome sexual harassment; 4) the charged sexual harassment had the effect of unreasonably interfering with the Petitioner's work performance and creating an intimidating, hostile, or offensive working environment; and 5) the existence of respondent superior liability. Griswold v. Fresenius USA, 978 F.Supp. 718, 730 (1997); Yeary v. Goodwill, 107 F.3d 443 (6th Cir. 1997) and Oncale v. Sundowner Offshore Services, Inc., 118 S.Ct. 998 (1998). Although each of the elements were satisfied in this matter, the lower Courts none-the-less refused to allow the case to proceed to trial. Petitioner submits that the lower Court decisions were based on a reluctance to accept male on male sexual harassment as well as the fact that there is little guidance provided in this novel area for determining what constitutes an actionable same sex sexual harassment claim. Thus, the instant Petition for Certiorari has been filed in an attempt to secure further clarity in this area of the law.

1. Respondents Engaged In Harassing And Retaliatory Conduct Based On Sex

This Court has found that Title VII evinces a "congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment." Meritor Savings FSB v. Vinson, 477 U.S. 57, 64 (1986); Newport News Shipbuilding & Drydock Co. v. EEOC, 462 U.S. 669, 682 (1983); Castaneda v. Partida, 430 U.S. 482 (1977). This Court has conclusively established that members of one gender can, as a matter of law, sexually harass one another within the meaning of Title VII. Oncale v. Sundowner Offshore Services, Inc., 118 S.Ct. 998, 1003 (1998).

Petitioner was treated differently from women in the workplace who made sexual harassment claims. Maurice Parsons was a supervisor at ABB Systems who reported a complaint by a woman not identified by the company who was sexually harassed by a male employee on her way to the restroom. The complaint went through the appropriate channels and the harasser, John Reed, was told of the complaint and that the harassment must cease. John Cooper, another supervisor, told of another male co-worker who told dirty jokes to a woman, also unidentified by ABB Systems; the co-worker was told by his supervisor to stop the harassing conduct. These were immediate and prompt responses from the employer in keeping with company policy and the dictates of Title VII.

In 1992 charges were brought by ABB employee Melinda L. Hoyle wherein she alleged that there were sexually explicit and offensive posters, calendars, and post cards in the work areas and offices. Respondents took her comments seriously and immediately responded. On two occasions they inspected ABB Systems premises for sexually

explicit posters, photos, etc. They claimed to have found nothing, but incredibly ordered the removal of such materials from the workplace.

Petitioner, like these women, was also subject to sexual harassment. However, when he complained the employer did nothing. There was no reporting up the ladder, no investigation of the premises was conducted, his supervisors did not order the removal of pornographic materials from the workplace, the harassers were not disciplined, and the harassment did not cease. Petitioner's allegations were not investigated until a year after an Equal Employment Opportunity Commission (EEOC) hearing which took place in November, 1997. In this situation, similarly situated female employees and a male employee (Petitioner) were treated dissimilarly and the treatment occurred because of sex. Such conduct is discriminatory and actionable. Harris v. Forklift Sys., Inc., 510 U.S. 17, 25 (1992) (Ginsburg, J., concurring). The lower Courts, however, ignored this evidence and summarily dismissed Petitioner's claims. Petitioner submits that this occurred not only because of the Courts' reluctance to accept same sex sexual harassment as a viable claim, but also because of the lack of established parameters for determining actionable same sex sexual harassment. That is why it is requested that the instant Writ be granted and the lower Courts provided guidance as to the parameters for permitting a same sex sexual harassment claim to proceed to trial.

The District Court in error segregated the conduct in this matter and contended that haranguing Petitioner while on sick leave, deleting computer files, and threatening Petitioner's employment, in isolation, lack any sexual connotations. A hostile work environment is an aggregate of harassing acts based on sex that make the work environment

intolerable. Courts are responsible for looking at the compelling nature of the abuse with an objective view of the totality of circumstances. Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993). The inquiry as to whether Respondents harassed Petitioner is based on whether "members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." Harris at 25. Some of the reasons for Petitioner's constructive discharge involved the harassers discriminating against Petitioner because of his perceived sexual orientation, constant exposure to unwanted and unwelcome pornographic images in the workplace, pornographic images that were clandestinely placed within his computer, obscene acts and jokes in the workplace, and the fact that his supervisors did not take corrective action on any of these activities. This is harassment based on Petitioner's sex in that he was singled out for such treatment because he would not conform his behavior to accommodate the disgusting pornographic images. He would not accept those images as apparently other males did in that environment. The EEOC agrees that a "workplace in which sexually offensive terms, displays of 'girlie' pictures, and other offensive conduct abound can constitute a hostile work environment even if some people deem it to be harmless or insignificant." EEOC Compliance Manual (CCH) S 614, P 3114(C)(1), at 3274 (1990). The harassment must be viewed from the victim's perspective, as well as from an objective point of view. Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993); Yates v. Avco Corp., 819 F.2d 630, 637 & n. 2 (6th Cir.1987) (stating that "men and women are vulnerable in different ways and offended by different behavior"). The lower Courts erred in failing to view the harassment from the victim's perspective as well as objectively. It is, therefore, requested that the instant Writ of Certiorari be granted in order that the lower Courts will have

clear guidance on what should be taken into consideration in deciding same sex sexual harassment claims.

2. The Harasser Is An Unusual Actor Who Discriminates Against His Own Sex

Petitioner demonstrated that, as a male, he was the victim of sexual harassment by other males in the workplace. Petitioner demonstrated evidence that he was the primary target of harassment. See Griswold v. Fresenius USA, Inc., 978 F.Supp. 718, 728 (N.D.Ohio1997) (holding evidence that members of one sex were the 'primary targets of harassment' sufficient for summary judgment). Hence, Petitioner demonstrated evidence that Respondents qualify as unusual employers who discriminate against members of their own sex. Because Petitioner complained and did not accept the pornography that other males readily accepted in the work environment, Petitioner's supervisors and co-workers believed Petitioner to be homosexual and questioned him about his sexual orientation. It has been held that Title VII proscribes discrimination based on sexual activities or sexual preference. Dillon v. Frank, 1992 WL 5436 (6th Cir. Mich). Yeary v. Goodwill Industries, Inc., 107 F.3d 443 (6th Cir. 1997). It is unlawful to discriminate against women because they are women and men because they are men. This Court in Oncale found that same sex sexual harassment is actionable even when all the parties are heterosexual. Oncale at 1002. Like the Petitioner in Oncale, Mr. Plummer was treated differently than male co-workers at ABB Systems who met the harassers' standard of masculinity. In other words, Petitioner was sexually harassed and suffered an abusive environment as a member of the same sex as the harasser; however, he did not conform to the stereotypical machismo gender role whose proponents have some perverse appreciation for obscene and pornographic depictions of naked women in lewd poses in the

workplace. Petitioner is an ordinary, reasonable, prudent male who was harassed because he did not conform to this gender stereotype and he himself felt harassed when co-workers and supervisors in the workplace subjected him to obscene photographs and similar depictions at his work station because he complained. Specifically, when Petitioner objected to the obscene and pornographic depictions in the workplace he was repeatedly asked if he was "gay", questioned why he had reached the age of thirty without being married, and was subjected to a hostile work environment including being targeted for harassment. This consisted of having important work deleted from his computer, having pornographic images placed on his computer, and having to face sexually explicit images in his work area on a daily basis until he was constructively discharged. Had the victim not been a male, but instead a female, the discriminatory behaviors in part because they were so blatant, would not have occurred. Cf. Pollard v. E.I.Dupont de Nemours, Inc., 16 F.Supp.2d 913, 921 (W.D. Tenn. 1998) (noting record replete with evidence that harassers were motivated by the feeling a member of the same sex did not belong).

Under this Court's Oncale decision, the fact that Petitioner was treated differently than female employees because of his sex was considered sufficient to create a viable same sexual discrimination claim. Oncale, Supra at 207. However, the lower Courts ignored this factor with respect to the instant same sex sexual discrimination claim. Such would not have been ignored if the tables were turned and a female had been treated differently than male employees and had had to exist in the same type work environment with the disgusting pornography as did Petitioner. Thus, the lower Court's refusal to apply the proper principles and accept same sex sexual harassment as a viable claim is clearly demonstrated in this case where if a female were involved, the

discrimination would have been unavoidable. The instant Writ is requested and necessary in order to clearly establish and reaffirm the constitutional protections this Court established in Oncale.

3. The Discriminatory Acts Were Offensive And Unwelcome

The essence of an inquiry into unwelcomeness is whether a sexually hostile environment was offensive or unwanted from an objective standpoint and from the point of view of the victim. Oncale v. Sundowner Offshore Service, Inc., 118 S.Ct. 998 (1998); Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993); Yeary v. Goodwill Industries-Knoxville, Inc., 107 F.3d 443 (1997); Griswold v. Fresenius, 978 F.Supp. 718 (1997). Based upon this record, there can be no doubt that Petitioner was personally offended and that anyone else in his position would have been offended. Mr. Plummer expressly and verbally rejected the depictions in the workplace. He also manifested his displeasure with the obscene photographs and complained to his supervisors about this and about the fact that obscene drawings were placed on his computer. Therefore, the fact that Plummer reported the conduct proves that he considered the conduct unwelcome. See Pollard v. E.I. Dupont de Nemours, Inc., 16 F.Supp. 2d 913, 921 (W.D. Tenn. 1998).

4. Hostile Or Abusive Work Environment

Whether an environment is hostile or abusive can be determined only by looking at all the circumstances. Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993). The facts set out above demonstrate sufficient evidence substantiating that the harassment in question had the purpose or effect of unreasonably interfering with Petitioner's work performance

or in creating an intimidating, hostile, or offensive work environment. Tarver v. Calex Corp., 125 Ohio App.3d 468, 478 (1998). Delaney v. Skyline Lodge. Inc. 95 Ohio App.3d 264, 270 (1994). Petitioner had pornographic pictures drawn on three different directories of his computer, had pornographic materials placed in his desk, tool box and work station, was subject to harassing phone calls, had semen and feces put on his tool box, had computer files deleted, was threatened with being fired by his supervisors when he complained of this activity, and was told by his supervisor to drop his complaint. (App. F at 41a-51a.) He was accused of being "gay" when he complained and thereafter wore a "homosexual mantle" for his complaints. Moreover, his supervisor thereafter complained about his output as a employee to management. Petitioner was also threatened with demotion because of his complaints and rebuffed and lied to by other supervisors when he took his complaints to a higher level. (App. F at 41a-51a.) Even then the harassment did not stop. Throughout his entire ordeal pornographic pictures were posted in the workplace representing one of the reasons as to why Petitioner brought his concerns to management in the first place. (App. F at 41a-51a.) Respondents' conduct also unreasonably interfered with Petitioner's work performance based on the fact that Petitioner's files were deleted and Petitioner was criticized over this. In addition, Petitioner's performance was rated lower after his complaints. (App. F at 41a-51a.) This Court in Harris explained that all of the above are relevant factors, of which "no single factor is required." Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993). An aggregate of all circumstances is the determinative factor. Cf. Hanson v. Regency Corp., 1996 Minn. App. Lexis 121 (Jan. 30, 1996) (unpublished) (finding some offensive acts, some frequent acts, and some severe acts ultimately resulting in constructive discharge and therefore supporting a hostile working environment claim). The

District Court erred in ignoring this evidence, weighing the evidence and by injecting its own biases into the review of how such conduct should affect a male. This bias is illustrated by the fact that other reasonable persons decided otherwise, such as the Ohio Bureau of Employment Services, which found the same activity just cause for Plummer's forced quit: "Claimant quit employment with ABB Industrial Systems because of unjustified reprimand, annoyance, discrimination or abuse by persons or authority or a coworker. The legal standard under Ohio law that determines whether a quit is for just cause is whether the action claimant took was that which would be taken by an ordinary person under similar circumstances. A review of the facts establishes that the Claimant quit with just cause."

In addition, as stated by the District Court, there may be some conflict between the deposition testimony, Petitioner's Affidavit and other evidence submitted in this case. It is very likely that all discrepancies on behalf of both parties have not been pointed out. There are times when the deposition testimony may not tell the whole story because of misunderstanding of questions or exhaustion from days of deposition testimony. That is precisely why we have trials and do not summarily decide factual matters in favor of one party or the other. Petitioner submits that the Trial Court erred in making such factual determinations and by excluding parts of Petitioner's Affidavit as in conflict with other evidence. The Court's bias against this same sex sexual discrimination claim and Claimant was apparent in this regard. This is especially so when the evidence for Summary Judgment purposes is required to be viewed in the light most favorable to the nonmoving party. Matsushita Elect. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

The truths, the clarifications and expectations needed to resolve conflicts or discrepancies in the evidence can only be brought out through the rigors of cross-examination and additional evidence and testimony at trial.

Additionally, in support of the fact that the ABB environment was hostile and abusive, although not required, is Petitioner's treating psychologist, Dr. Richardson's opinion that Plummer sustained serious psychological injury as a result of the employer's actions in this case. (App. G at 52a-55a.) See Tarver v. Calex Corporation, 125 Ohio App.3d 468, 478 (1998). That an employee can suffer great harm at work and still function is a testament to Petitioner, not a barrier to relief.

The lower Courts, however, ignored all this evidence and would not permit this matter to proceed to trial. As such, those Courts are clearly demonstrating a reluctance to accept same sex sexual harassment as a viable claim. It is, therefore, requested that the instant Writ of Certiorari be granted in order to ensure that men receive the same constitutional protections in their employment environment against sexual harassment as do women.

5. Constructive Discharge And Retaliation Demonstrated

Petitioner complains that he suffered in an intolerable work environment based on sex and this caused his constructive discharge. There were pornographic depictions throughout the workplace. When he complained about these images Respondents drew pornographic depictions on his computer and he was taunted and ostracized as a homosexual. The comments to Petitioner about his sexuality, the threats of discharge, the lower evaluation, attempt to demote after he

complained, the deletions of his computer files, the placing of sexual depictions in his tool box, and in his desk, and the obscene photographs in the workplace were "commonplace, ongoing, continuing, pervasive and widespread." See Abeita v. TransAmerican Mailings, Inc., 159 F.3d 246, 251 (6th Cir. 1998). Respondents intended to force Petitioner's resignation by making false accusations against his work performance and subjecting him to greater antagonism. All of this related to the issue of constructive discharge and retaliation based on same sex sexual harassment and sexual hostility. Dillon v. Frank, 1992 WL 5436 (6th Cir. Mich).

Petitioner resigned because of these and other abusive and discriminatory activities by his employer which made for the intolerable working conditions which he had to endure for years. See Robson v. Eva's Supermarket, Inc., 538 F.Supp. 857 (N.D. Ohio 1982); Jacobs v. Martin Sweets, Inc., 550 F.2d 364 (6th Cir, 1977). This was evidence upon which the District Court could have found that the activities of Respondents had the effect of substantially interfering with the Petitioner's work performance or creating an intimidating, hostile, or offensive work environment and resulted in constructive discharge.

6. *Respondeat Superior* Liability Demonstrated

Respondents had notice and failed to respond adequately and thus cannot prevent *respondeat superior* liability. Kaufman v. Allied Signal, Inc., 970 F.2d 178, 184; Kerans v. Porter Paint Co., 61 Ohio St.3d 486, 433 (1991) (adequacy of an employer's response in a particular situation is a factual matter to be determined on a case by case basis).

Respondents' response to Petitioner's complaint was wholly inadequate. Haywood admitted he entered the

pornographic images into Petitioner's computer and Respondents' own sexual harassment policy was supposed to address this kind of harassing activity, to wit:

> "Sexual harassment in the workplace . . . is prohibited . . . . This may include, but is not limited to, repeated offensive or unwelcome sexual flirtations, advances, propositions, verbal abuse of a sexual nature, graphic verbal commentaries regarding an individual's body, sexually degrading words used to describe an individual or the *display of sexually suggestive objects or pictures*."(emphasis added).

Nonetheless, Haywood was not disciplined for this harassment.

Instead of telling the harassers to stop harassing, or in the alternative, disciplining the harassers, Respondents effectively ratified the conduct. Respondents' actions communicated that, as long as business interests were upheld, the individual's right to be free from a hostile and offensive environment was trivialized. See Pollard, supra, at 917-920 (inadequate merely to ask what happened and not further investigate); Kerans, supra, at 434 (imposing liability on the employer who assumes a 'boys will be boys' attitude).

Respondents also cannot claim they did not know about the sexually explicit pictures in the facility. It is clear the Respondents knew or should have known. Scandinavian Health Spa, Inc., v. Ohio Civil Rights Commission, 64 Ohio App. 34 480, 581 (1990). Respondent Haywood indicated pornographic materials were present "pretty much throughout" his thirteen years of ABB employment.

Contrary to its own policies against sexual harassment, Respondents, did nothing after Petitioner's complaints, thereby ratifying the sexually harassing and abusive acts of supervisors and co-workers. As such, *respondeat superior* liability was demonstrated.

7. Liability Of Respondents Haywood And Canter Demonstrated

The District Court agreed that "a genuine issue of material fact was presented" on the issue of whether Canter was Petitioner's supervisor during the period of the alleged retaliatory activities.

Evidence in this record as set out in the Statement of Facts under the Supervisory Authority heading further demonstrates that both Canter and Haywood were also supervisors with respect to the other matters presented herein.

The Ohio Supreme Court in addressing Ohio's anti-discrimination statute (O.R.C. Chapter 4112) has determined that "there is no place in Ohio for any sort of discrimination no matter its size, shape or form or in what clothes it may masquerade." Genaro v. Central Transport, Inc. , 84 Ohio St. 3d 293,296 (1999). Supervisors and Managers may be held jointly and/or severally liable with their employer for discriminatory conduct of the supervisor/manager in violation of O.R.C. §4112. Genaro at 300. Respondents' own policies on sexual harassment provided that managers, employees, and third parties may be responsible for sexual harassment. The record in this matter also consistently demonstrates that Plummer, Canter and Haywood acted as supervisors while serving as Team Leaders. Hence, there is ample evidence that these individuals held leadership positions in Respondents' company during the time of the sexual

harassment against Petitioner and as such can be found liable for the discrimination under the law. Yet, the lower Courts, because of their reluctance to accept same sex sexual harassment claims, failure to properly apply general male/female sexual harassment precedent to the instant same sex sexual harassment claim and because of the lack of any legal precedent dealing specifically with same sex sexual harassment again would not accept the evidence as demonstrating a viable claim that should proceed to trial. As such, additional action by this Court as requested in the instant Writ of Certiorari is necessary to ensure that viable same sex sexual harassment claims are permitted to proceed to trial.

B. The Decisions Of The District Court And Court Of Appeals Regarding Sufficiency Of The Evidence Is In Direct Conflict With This Court's Opinion In Oncale v. Sundowner.

An examination of the evidence set out above demonstrates that this Court's dicta in Oncale for determining same sex sexual harassment was satisfied by the evidence in this case. Yet, the District Court and Court of Appeals refused to allow this matter to proceed to trial. As such, the lower Court decisions in this case are in direct conflict with this Court's decision in Oncale.

As such, it is respectfully requested that the instant Writ of Certiorari be granted in order to not only provide further clarification and guidance as to what constitutes a valid and triable issue of same sex sexual harassment, but also to ensure, as was attempted in Oncale, that males receive the same constitutional protections as females with respect to

sexual discrimination and harassment in the American work force.

An example of the need for clarification and guidance from this Court on this issue occurred when, at Oral Argument, a Sixth Circuit Court of Appeals Judge, in reference to this Court's Oncale opinion, began to ask a question as to whether or not "dirty jokes" in a work environment alone could constitute same sex sexual harassment, but in mid sentence said use "swearing" instead. The Judge's retraction indicates an understanding that "dirty jokes" could conceivably constitute male on male sexual harassment under Oncale whereas "swearing" may not. However, it is also an indication that the Courts are unclear as to the sufficiency and parameters of evidence required to constitute a triable same sex sexual harassment claim.

As set out in the record, an ABB female employee complained about dirty jokes and her supervisors made sure such was stopped immediately. However, when Plummer complained about the dirty jokes, obscene acts, pornography in his work environment and comments regarding his sexuality, nothing was done. It is the need to address this dissimilar treatment between the sexes which is a substantial reason why the instant Writ of Certiorari is requested and should be granted.

The question submitted based upon the facts of this case is, "why if our laws would not permit a female to be treated in such manner and subject to such a pornographic work environment as was the Petitioner, is it okay as concluded by the lower Courts in this case for a male (Petitioner) to be treated in such manner and subject to such a pornographic work environment? Surely this was not the result intended by this Court in Oncale. In order to address

and alleviate the injustice and lack of equal treatment of males and females demonstrated by this record this Court is urged to grant the instant Writ of Certiorari.

CONCLUSION

Should the Respondent Company not be held responsible at all for the lives this situation has negatively affected and could still affect based upon this Court's decision? Mr. Plummer is just an average person that was trying to pursue his vocation and a life, like most other Americans. He did not ask for this to happen to him. He has not pursued this matter for the past five years with its tremendous costs and effects upon his life because only insignificant activity occurred in that work environment as the lower Court seemed to have concluded. What occurred as set out above with Mr. Plummer in the ABB Respondent work environment is an injustice and Petitioner submits proscribed under this Court's Oncale decision.

Therefore, based upon the need for clarity and guidance to assist the lower Courts in determining the circumstances under which there is sufficient evidence to constitute a triable same sex sexual harassment claim and because the lower Court decisions in this matter are in direct conflict with this Court's opinion in Oncale, it is requested in order to ensure that males and females receive equal treatment and the same constitutional protections with respect to sexual discrimination and harassment, that the instant Writ of Certiorari be granted.

Respectfully submitted,

/s/_____

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed November 9, 2000]

No. 99-4335

JEFFREY PLUMMER, *Plaintiff-Appellant*,	)
v.	)
ABB INDUSTRIAL SYSTEMS, INC.; DOHN HAYWOOD; DICK CANTER, *Defendants-Appellees*.	)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

Filed: November 9, 2000

MEMORANDUM OPINION

BEFORE: MARTIN and NORRIS, Circuit Judges; FORESTER, District Judge.*

PER CURIAM. Following his resignation from ABB Industrial Systems, Inc., plaintiff, Jeffrey Plummer, brought suit against ABB Industrial Systems, Inc. and two co-workers, asserting claims of sexual harassment, retaliation, negligent supervision, wrongful discharge, and negligent and/or intentional infliction of emotional distress. The district court granted summary judgment to defendants as to all claims. Plaintiff now appeals from that decision.

Having had the benefit of oral argument and having carefully considered the record on appeal, the briefs of the parties, and the applicable law, we are not persuaded that the district court erred in granting summary judgment to defendants.

Because the reasoning which supports summary judgment for defendants has been articulated by the district court, the issuance of a detailed written opinion by this court would be duplicative and serve no useful purpose. Accordingly, the judgment of the district court is affirmed upon the reasoning employed by that court in its memorandum opinion and order dated October 13, 1999.

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* The Honorable Karl S. Forester, United States District Judge for the Eastern District of Kentucky, sitting by designation.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

[Filed October 13, 1999]

No. C2-98-463

Jeffrey Plummer,	)
Plaintiff,	)
	)
vs.	)
	)
ABB Industrial Systems, Inc., et al.,)	
Defendants.	)
	)

JUDGE GRAHAM

MEMORANDUM OPINION AND ORDER

Plaintiff Jeffrey L. Plummer is a 33-year old white male who was employed by defendant ABB Industrial Systems, Inc. ("ABB"). Plaintiff began his employment in 1990 as a machinist.[1] In 1994, plaintiff became a programmer

[1] Plaintiff began his employment in January, 1990. He was laid off in June, 1990 and in November, 1990, he was re-hired as an employee of Tailored Management, Inc., an employee leasing

of a computer-operated machine used to fabricate metal parts and he continued in this position until he resigned his employment on July 31, 1996.

Plaintiff claims that during his employment at ABB, he was the victim of same-sex sexual harassment and that this resulted in his constructive discharge when he resigned. Plaintiff asserts claims against ABB, Dohn Haywood and and Dick Canter. He alleges that Haywood and Canter were his supervisors and that they participated in the alleged sexual harassment and/or retaliated against him when he complained about the sexual harassment. Plaintiff asserts claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., the Civil Rights Act of 1991, 42 U.S.C. §1981a, and Ohio Revised Code §4112.02. His claims include sexual harassment, retaliation for complaining about sexual harassment, negligent supervision, wrongful discharge and intentional and/or negligent infliction of emotional distress. This matter is now before the court on defendants' motion for summary judgment.

Under Fed. R. Civ. P. 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." See LaPointe v. United

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firm. He continued to perform services for ABB as an employee of Tailored Management until 1994, when he was re-hired by ABB. None of the parties have attached any legal significance to the fact that plaintiff's actual employer from November, 1990 until sometime in 1994 was Tailored Management, Inc.

Autoworkers Local 600, 8 F.3d 376, 378 (6th Cir. 1993); Osborn v. Ashland County Bd. of Alcohol, Drug Addiction and Mental Health Servs., 979 F.2d 1131, 1133 (6th Cir. 1992) (per curiam). The party that moves for summary judgment has the burden of showing that there are no genuine issues of material fact in the case at issue, LaPointe, 8 F.3d at 378, which may be accomplished by pointing out to the court that the nonmoving party lacks evidence to support an essential element of its case. Barnhart v. Pickrel, Schaeffer & Ebeling Co., 12 F.3d 1382, 1389 (6th Cir. 1993). In response, the nonmoving party must present "significant probative evidence" to demonstrate that "there is [more than] some metaphysical doubt as to the material facts." Moore v. Philip Morris Cos., 8 F.3d 335, 339-40 (6th Cir. 1993). "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). See generally Booker v. Brown & Williamson Tobacco Co., 879 F.2d 1304, 1310 (6th Cir. 1989).

In reviewing a motion for summary judgment, "this Court must determine whether 'the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" Patton v. Bearden, 8 F.3d 343, 3346 (6th Cir. 1993) (quoting Anderson, 477 U.S. at 25153). The evidence, all facts, and any inferences that may permissibly be drawn from the facts must be viewed in the light most favorable to the nonmoving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); see Eastman Kodak Co. v. Image Technical Servs., Inc., 504

U.S. 451 (1992). However, "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Anderson, 477 U.S. at 252; see Gregory v. Hunt, 24 F.3d 781, 784 (6th Cir. 1994). Finally, a district court considering a motion for summary judgment may not weigh evidence or make credibility determinations. Adams v. Metiva, 31 F.3d 375, 378 (6th Cir. 1994).

During plaintiff's employment at ABB, he worked with thirty to fifty-five other machinists in a predominately male workforce. Plaintiff claims that in 1993 he confronted defendant Haywood about reading Playboy magazines on the job. At this time, plaintiff was a team leader in the machine shop and Haywood was one of the machine operators on his team. According to plaintiff, when he confronted Haywood about reading the magazine, Haywood responded with the statement, "Why? Are you gay?" Plaintiff's Depo., p. 148. Plaintiff further alleges that a few weeks later, he overheard Haywood tell another employee, Don Hustead, that he, plaintiff, was gay. Id., p. 151. About two months after that, still in the year 1993, Haywood and Hustead allegedly asked plaintiff why he was almost thirty years old and never married. Id., p. 153. Shortly after the incident involving the Playboy magazine, plaintiff complained to Maury Parsons, manager of the machine shop, that Haywood and other machinists were reading Playboy magazines and displaying photographs of nude women in the machine shop and that it was interfering with their work. Id., p. 155-156. Referring to his conversation with Haywood, plaintiff says he told Parsons, "Look, I asked him to put it away and he asked me if I was gay." Id. According to plaintiff, Parsons said,

"Don't make a big deal of it." Id. Apparently referring to his complaint about the reading of Playboy magazines and the photos of nude women, plaintiff says Parsons told him to "drop it." Id., p. 157. From then until plaintiff resigned his employment in July, 1996, a period of over two and a half years, no one made any further comments about plaintiff's sexual orientation. Id., p. 153.

Plaintiff alleges that his immediate work environment "was a sexually derogatory environment with nude pictures of women hung about." Complaint ¶25, p. 6. Plaintiff claims that during his employment at ABB, magazines containing photographs of nude women and individuals engaged in sexual acts were commonly found in drawers and cabinets in the machine shop and that photographs of this kind, cut out of magazines, were posted or hung on both the inside and outside of tool cabinets. Plaintiff's Depo., pp. 163-166. After August, 1995, plaintiff did not see any photographs depicting sexual activity, Id., p. 164, although photographs of naked women, including calendars featuring naked women, continued to be displayed in the machine shop. Id. pp. 167-168. Other than his complaint to Parsons in 1993 about the reading of Playboy magazines and the hanging pictures of nude women interfering with the machinists work, plaintiff made no other complaints about inappropriate photographs in the workplace. Id., pp. 191-192. Plaintiff does not claim that he ever told anyone at ABB that he was offended, intimidated, or humiliated by these photographs or that they affected his work environment or his ability to do his job. Plaintiff concedes that the photographs that were openly displayed in the machine shop were not intended to harass him, "they were just done because they were allowed." Id., p. 203.

Plaintiff claims that other photographs of naked men and women including individuals engaged in sexual acts were placed in his personal toolbox, file cabinet and desk drawer by persons unknown. Id., p. 200. Plaintiff has identified fourteen photographs and three pages of cartoons which he says he found in his personal toolbox, file cabinet and desk drawer over a two-year period. Id., p. 407. Plaintiff's Response to Defendants' Motion for Summary Judgment, Ex. 2A-2L. Plaintiff admits that he never reported to anyone at ABB that these materials were being placed in his toolbox, file cabinet or desk drawer.[2] Id., p. 204.

In August, 1995, Haywood, who was working on the third shift, was showing Hustead, who shared a computer with the plaintiff, how to use EasyCad, a computer-assisted design program. Haywood prepared a drawing consisting of a pair of concentric circles which he labeled "TITS". The EasyCad program automatically saved this drawing to three directory files. The next day when the plaintiff turned on the computer, it called up the last created file and displayed Haywood's

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[2] Not only did plaintiff fail to complain about this kind of harassment during his employment at ABB, it is not mentioned in the complaint he filed with the Ohio Civil Rights Commission on January 14, 1997. The collection of photographs and cartoons which were allegedly deposited in plaintiff's personal toolbox, file cabinet and desk drawer over a two-year period, surfaced for the first time at plaintiff's deposition which was taken in July, 1998. Their existence was a surprise not only to defendants' counsel, who had previously requested such items in discovery, but apparently also to plaintiff's own counsel, whose comments on the record of the deposition indicate that he likewise was unaware of their existence. See Plaintiff's Depo., pp. 255-266.

drawing. Plaintiff's Depo., pp. 161-162; Plaintiff's Response To Defendants' Motion for Summary Judgment, Exh. 1. Plaintiff complained about this to his team leader, defendant Canter. Plaintiff's Depo, p. 214. According to plaintiff, Canter told him he was over-reacting. Id. Plaintiff says he told Canter that he was also concerned that if unauthorized persons had access to the computer, they could do something that would affect his work. Id., p. 215. Indeed, plaintiff says that at about the time he discovered Hay-wood's drawing, he also found that someone had deleted thirty-five files he had been working on. Id., p. 212. Plaintiff says that he told Canter that if he refused to do anything about the drawing, he would report the matter to Human Resources. Id., p. 218. According to plaintiff, Canter replied that if he felt that strongly about the matter, he should report it to Human Resources but warned him that there would be "strong repercussions" if plaintiff "went over him about it." Id.

ABB has an "open door" management policy. If an employee is dissatisfied with his immediate supervisor's resolution of an issue he or she is free to take the issue directly to the highest level of management and/or to the Department of Human Resources. Plaintiff was not satisfied with Canter's response to his complaint about Haywood's drawing and the deletion of files from his computer. He reported the matter to Parsons when he returned from sick leave. According to plaintiff, Parsons said that he was not going to do anything about it. In October, 1995, plaintiff complained to Mari Jo Cary, a manager of ABB's Human Resources Department. Plaintiff's Depo., pp. 188-189.

When plaintiff met with Ms. Cary, he was accompanied by two other people who had complaints about Haywood's work performance. Plaintiff claims that he complained to Ms. Cary about the drawing Haywood had created on the computer, that he told her that he considered it to be pornographic and that he also complained "about the whole issue of being harassed." Plaintiff's Depo., p. 170. However, plaintiff admits that he did not tell Ms. Cary about the photographs of naked men and women in the machine shop, the photographs of men and women engaging in sexual activity in the machine shop, or the similar kinds of photographs that had been placed in his toolbox, filing cabinet and desk drawer by persons unknown. He also said nothing about the comments Haywood and Hustead made about his sexual orientation in 1993. Plaintiff's Depo., pp. 190-191. According to Ms. Cary, plaintiff did not complain of sexual harassment. Cary Depo., p. 70. Plaintiff does not dispute her testimony. Ms. Cary initiated an investigation of plaintiff's complaint about the computer drawing and notified the Vice-President of Human Resources, John Cooper, and the Vice-President of Manufacturing, Ken Morris. Cary Depo., p. 32. As a result of plaintiff's complaint, a meeting was held which was attended by plaintiff, Ken Morris, Ms. Cary and the other two employees who had complaints about Haywood's work. According to Ms. Cary, the subject of discussion at this meeting was Haywood's attendance and work performance, including his use of the computer for things that were not relevant to work. The drawing plaintiff complained about was mentioned as an example of the latter. It was decided that Morris should meet with Haywood regarding the drawing. Subsequently, Morris met with Haywood. Haywood admitted creating the drawing, saying that he had been clowning around during a training session

and thought he had deleted it. Cary Depo., p. 97. Haywood was given a verbal reprimand for using the computer to prepare the drawing. Haywood was also removed from his position as team leader. Morris Depo., p. 16.

Plaintiff was not satisfied with Morris's response to his complaint about Haywood's use of the computer and twice renewed it, whereupon Morris allegedly told him that "If he ever heard me mention Don Haywood's name again, he would fire me." Plaintiff's Depo., p. 243.

In February, 1996, plaintiff dislocated his right thumb when he fell off a motorcycle. Rohner Depo., pp. 6-7. As a result, plaintiff was off work for several weeks. Plaintiff alleges that Canter and Morris harassed him while he was on disability leave by repeatedly requesting that he return to work and by contacting his doctor to obtain a release for him to return to light duty. Plaintiff's doctor testified that ABB contacted him twice about plaintiff's ability to return to work. Id~, p. 16. On the first occasion, March 15, 1996, ABB sent the doctor a note saying that his job was light work which required no physical lifting and that they had various jobs he could do with one hand. Id., pp. 10-11. Having received no response, ABB inquired again on March 22, 1996, whereupon Dr. Rohner wrote a note authorizing plaintiff to return to work on March 25, 1996 "to light duty - one-handed. No power use of right hand." Id., pp. 11-12. These restrictions were removed on April 9, 1996. Id., p. 13.

In March, 1996, plaintiff underwent a peer review assessment of his job performance. This review was known as a "360 review". Plaintiff's performance was evaluated by his fellow workers or "team members", by his team leader

and by the manager of his department. He received an overall score of 2.8 out of a possible 4 points. This was two-tenths of a point lower than his previous review in March, 1995. At the time of this performance review, plaintiff's team leader was defendant Canter. Under the rating scheme in effect, the votes of the team leader and department manager were assigned greater weight than the votes of the team members. Canter testified that he rated plaintiff at no less than 3.0. Canter Depo., p. 32. A total of fourteen individuals participated in this evaluation, apparently including Haywood and Hustead. Plaintiff's Depo., Ex. 13. The report of this peer review included these comments: "Work better with team . . . should learn how to listen to others. Also should learn how to interact with the rest of us." Plaintiff alleges that Canter selected the team members who participated in plaintiff's review and purposely selected Haywood and Hustead knowing that they disliked plaintiff, in order to manipulate the performance review to plaintiff's detriment. Availing himself of the company's open door policy, plaintiff complained to Morris about his 360 review. Morris Depo., p. 23. After complaining to Morris, plaintiff prepared a different version of a peer review questionnaire and circulated it among his team members and others. Plaintiff claims that he prepared the second peer review in accordance with Morris's instructions but that when he presented it to him, Morris said it was worthless and threw it in the waste can. Plaintiff's Depo., p. 249. According to plaintiff, Morris told him that if the score on his 360 review did not improve, "I would be like the cows in Europe that had the Mad Cow Disease and I would be terminated."

On July 30, 1996, plaintiff met with Mike Sallows, who replaced Parsons as manager of the metal fabrication

department. According to plaintiff, Sallows told him that he would be transferred back to the third shift as a machinist at the same or a higher rate of pay. Plaintiff told Sallows that he wouldn't work third shift again because he didn't like it very well. Plaintiff's Depo., p. 194. According to plaintiff, Sallows also told him that there were five reasons he could fire him that day. Plaintiff's Depo., p. 221. Plaintiff made no verbal response to Sallows but, the following day, sent him an e-mail letter of resignation, which read as follows:

> Well the "JOKERS" are at it again!! I tried to process a program and someone has taken my key. I new [sic] something like this would happen. This kind of behavior has to be expected when management promotes such types of corruption. By this I mean that if managers tolerate corruption then they Promote it. I can't keep on working in this extremely harassing and hostile environment. BETWEEN THE SEXUAL HARASSMENT OF PORNOGRAPHIC DRAWINGS ON MY COMPUTER, TAMPERING WITH MY COMPUTER, THREATS OF FIRING BY THE PRESIDENT OF THE COMPANY (KEN MORRIS) FOR MISSING WORK EVEN THOUGH IT WAS BECAUSE OF AN ACCIDENT AND DOCTOR EXCUSED, DEFAMATION OF CHARACTER AND LIES BY MANAGEMENT (DICK CANTER), THIS WORK PLACE HAS BECOME TOO HOSTILE FOR ME TO KEEP ON WORKING HERE!!

I QUIT!!!!!

JEFF L. PLUMMER

PLAINTIFF'S AFFIDAVIT

The foregoing recitation of facts is based on plaintiff's 410-page deposition and, to a lesser extent, the deposition testimony of other witnesses when not contradicted by plaintiff. Plaintiff's response to the motion for summary judgment includes his own affidavit which contains statements which are inconsistent with his deposition testimony.

In ¶2 of his affidavit, plaintiff describes a series of disgusting pranks or practical jokes engaged in by Haywood and another machinist, Paul Schreiber, during 1992 and 1993. Some of these have sexual connotations. None of these activities are mentioned in plaintiff's complaint herein nor in the charge of discrimination he filed with the Ohio Civil Rights Commission. Plaintiff asserts in his affidavit that Haywood was responsible for putting what plaintiff "believes" was semen on his toolbox, that he put human feces in plaintiff's toolbox and Schreiber's toolbox and that Haywood placed a note on plaintiff's toolbox which contains an offensive sexual reference to cheese. In his deposition, however, plaintiff testified that Haywood and Schreiber were involved in playing pranks on each other which he described as a game in which they would "mess with each other's stuff." Plaintiff's Depo., p. 370. He did not say that he was the object of any of these pranks. He said instead that sometimes Schreiber would blame him for what Haywood had done to Schreiber. Id. With regard to the cheese incident, plaintiff testified that Haywood put the note on Schreiber's

toolbox. Id. In his deposition testimony about the pranks engaged in by Haywood and Schreiber in 1992 and 1993, plaintiff said nothing about any incidents involving human excrement or a substance that he believed was semen. In the final sentence of ¶2 of his affidavit, apparently referring to the offensive pranks described in that paragraph, plaintiff states "I complained to three ABB supervisors, Dohn Haywood, Bruce Mossgrove and Maury Parsons, about the sexually-related actions and they did nothing." However, in his deposition when asked who he had spoken about the pranks engaged in by Haywood and Schreiber, plaintiff's answer was as follows:

> Well, I was new at the company. A lot of it was -- and I didn't want to cause problems. I didn't say that much to anybody.

Plaintiff's Depo., p. 370.

In ¶3 of his affidavit, plaintiff alleges that he overheard Haywood say to Hustead, "There goes a fag." as he walked past them. In his deposition, plaintiff said that he overheard Haywood tell Hustead that he was gay and made no reference to any offensive sexual epithet.

In ¶4 of his affidavit, plaintiff describes statements allegedly made by Parsons when he spoke to him about the incident in which he confronted Haywood about reading a Playboy Magazine on the job and Haywood asked him if he was gay. In the affidavit, plaintiff says:

> I also told him that we should take down all of the nude pictures and calendars of women that

> were hanging in the shop. Maurey stated to me very assertively to drop it, he also told me that I had a very promising career and not to do anything to jeopardize it. He said it was an all-male shop and this kind of behavior had to be tolerated.

This stands in contrast to plaintiff's deposition testimony. When asked what Parsons said when he complained about the Playboy magazines, nude pictures and Haywood's comment about being gay, plaintiff testified that Parsons said, "Don't make a big deal of it." and later testified that "I was told by Maury to drop it." Plaintiff's Depo., pp. 156-157.

In ¶5 of his affidavit, plaintiff describes finding "numerous pornographic photos in my desk, toolbox, and other of my personal belongings." He says that at first he did not complain about this because he was afraid of losing his job. However, he goes on to say that, in 1993, he did report this conduct to Parsons "but he did nothing and threatened me even more with losing my job." In his deposition, plaintiff testified that unknown persons were depositing materials of this kind in his personal toolbox, filing cabinet and desk. Plaintiff's Depo, p. 200. Apparently, this continued for over two years. Plaintiff's Depo., p. 407. When he was asked in his deposition if he ever asked who put these photographs in his toolbox and desk, he said he never brought it up because he couldn't prove who was doing it. Plaintiff's Depo., p. 204. In his deposition, plaintiff said that he had but one discussion with Parsons about the issue of nude photographs, and that this was in 1993. Plaintiff's Depo., pp. 191-192. In describing this conversation, plaintiff said nothing about

reporting the fact that unknown persons had been depositing nude photos in his toolbox and desk. Plaintiff Depo., p. 156.

A party may not create a factual issue by filing an affidavit after a motion for summary judgment has been made which contradicts his earlier deposition testimony. Gagne v. Northwestern National Ins. Co., 881 F.2d 309, 315 (6th Cir. 1989); Reid v. Sears Roebuck & Co., 790 F.2d 453, 460 (6th Cir. 1986); Biechele v. Cedar Point, Inc., 747 F.2d 209, 215 (6th Cir. 1984). In ruling on the instant motion for summary judgment, the court has considered plaintiff's lengthy deposition testimony but the court will disregard the additional allegations in plaintiff's affidavit which are inconsistent with his deposition testimony.

SEXUAL HARASSMENT

In Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), the Supreme Court held that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment. The Court, id. at 67, quoted with approval the following passage from the opinion of the 11th Circuit in Henson v. City of Dundee, 682 F.2d 897, 902 (11th Cir. 1982):

> Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make

> a living can be as demeaning and disconcerting as the harshest of racial epithets.

The Court went on to note, however:

[N]or all workplace conduct that may be described as "harassment" affects a "term, condition, or privilege" of employment within the meaning of Title VII . . . . " For sexual harassment to be actionable, it must be sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment." [quoting Henson, 682 F.2d at 904].

477 U.S. at 67.

In Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993), the Supreme Court reaffirmed the standard of liability for sexual harassment established in Meritor, saying:

> When the workplace is permeated with "discriminatory intimidation, ridicule, and insult," [Meritor,] 477 U.S., at 65, that is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment," id., at 67 (internal brackets and quotation marks omitted), Title VII is violated.

The Court emphasized that conduct which is merely offensive is not actionable repeating what it said in Meritor that "'mere utterance of an . . . epithet which engenders offensive feelings in an employee' . . . does not sufficiently affect the conditions of employment to implicate Title VII." Harris, 510 U.S. at

21 (quoting Meritor, 477 U.S. at 65). The Court went on to state, Id.:

> Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment - an environment that a reasonable person would find hostile or abusive - is beyond Title VII's purview.

Finally, the Court in Harris, 510 U.S. at 23, spelled out some of the circumstances which courts should consider in determining whether an environment is "hostile" or "abusive":

> These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.

In Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998), the Supreme Court held that workplace harassment may violate Title VII's prohibition against "discriminat[ion] . . . because of . . . sex" 42 U.S.C. §2000e(2)(1), even when the harasser and the harassed employee are of the same sex. The Court stressed, however, that "Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at "discriminat[ion] . . . because of . . . sex." 523 U.S. at 80. (Emphasis in original). The Court further noted, Id.:

> We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations.

The Court reiterated, Id. at 81:

> Whatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted "discriminat[ion] . . . because of . . . sex." (Emphasis in original).

Finally, in Onacle, the Court rejected the notion that Title VII should be expanded into a general civility code:

> The prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in the workplace; it forbids only behavior so objectively offensive as to alter the "conditions" of the victim's employment. "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment--an environment that a reasonable person would find hostile or abusive--is beyond Title VII's purview." Harris, 510 U.S., at 21, citing Meritor, 477 U.S., at 67. We have always regarded that requirement as crucial, and as sufficient to ensure that courts and juries do not mistake ordinary socializing in the workplace---such as

> male-on-male horseplay or intersexual flirtation--for discriminatory "conditions of employment."

523 U.S. at 81.

A plaintiff who asserts a sexual harassment claim against his or her employer must establish a basis for respondeat superior liability. In a case of co-worker sexual harassment, the plaintiff must prove that the employer, through its agents or supervisory personnel, knew or should have known of the sexual harassment and failed to implement prompt and appropriate corrective action. See Kauffman v. Allied Signal, Inc., Autolite Div., 970 F.2d 178, 183 (6th Cir. 1992). In a case of sexual harassment by a supervisor, the employer is liable unless it can prove by a preponderance of the evidence: (a) that it exercised reasonable care to promptly correct any sexually harassing behavior; and (b) that the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer. Faragher v. City of Boca Raton, 524 U.S. 775 (1998).

In considering claims of discrimination under Ohio Revised Code Chapter 4112, the Ohio courts follow the tests established by the federal courts under Title VII. See Little Forest Medical Center of Akron v. Ohio Civil Rights Commission, 61 Ohio St.3d 607, 609-610 (1991); Plumbers and Steamfitters Joint Apprenticeship Committee v. Ohio Civil Rights Commission, 66 Ohio St.2d 192, 196 (1981); Omobien v. Ohio Civil Rights Commission, 89 Ohio App.3d 100, 104 (1993).

In the instant case, plaintiff's sexual harassment claim fails as a matter of law. The three comments made by Haywood and Hustead in 1993 were isolated and sporadic. They were not hostile or intimidating. Neither Haywood nor Hustead were supervisors at that time. Plaintiff reported only one of these comments to a supervisor. He told Parsons that Haywood asked him if he was gay when he confronted him about reading a Playboy magazine on the job. Plaintiff was complaining to Parsons that Playboy magazines and nude photos were distracting his team members from the performance of their duties. He did not articulate a complaint of sexual harassment, and the facts he reported to Parsons would not have put him on notice that plaintiff was making such a complaint.

With respect to the presence of Playboy magazines and nude photographs in the machine shop, plaintiff concedes that these materials were not displayed in order to harass him. He has offered no evidence that the presence of these materials created a sexually hostile work environment in the machine shop which would have been perceived as such by a reasonable person or that he subjectively perceived them as such. Plaintiff never removed any of these materials, nor did he ever complain that they were interfering with his work. His only complaint about them was his complaint to Parsons in 1993 that they were distracting other member of his team.

The nude photographs and other offensive materials which were allegedly deposited in plaintiff's personal toolbox, drawer and desk come closer to raising a genuine issue of material fact on the issue of sexual harassment. However, there is no basis for respondeat superior liability inasmuch as

the perpetrator or perpetrators are unknown and plaintiff never complained to his employer about this conduct.

Finally, Haywood's August, 1995 drawing of a pair of concentric circles labeled "Tits" does not either alone, or in combination with any of the other matters plaintiff complains of, elevate this case to the status of a litigable sexual harassment claim. Assuming that Haywood intended this drawing to be seen by plaintiff, it was nothing more than a juvenile, prank. No reasonable person would have viewed this silly but innocuous drawing as sexually derogatory, hostile, intimidating or offensive.

Considering the totality of the circumstance, a jury could not reasonably find that the matters plaintiff complains of as sexual harassment, at least those as to which ABB had actual or constructive knowledge, was so severe or pervasive so as to alter the conditions of his employment and create an abusive environment.

ABB is entitled to judgment as a matter of law on plaintiff's claim of sexual harassment under state and federal law.

RETALIATION

Plaintiff claims that Canter and Morris threatened him with retaliation when he persisted in his complaints about Haywood's computer drawing and he claims that his subsequent treatment vis-a-vis his dislocated thumb, his peer review and Sallows' July 30, 1996 statements that he was going to transfer him to the third shift and that he had good

grounds to fire him were all retaliation for his complaints about the drawing.

42 U.S.C. §2000e-3a provides in part as follows:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

This provision has two components, an opposition clause and a participation clause. Under the facts of this case, plaintiff may not invoke the participation clause because the alleged retaliation does not relate in any way to a proceeding which had been commenced under Title VII. He may, however, invoke the opposition clause and he would be entitled to relief if he was the victim of retaliation as a result of his opposition to any practice made unlawful by Title VII. That would, of course, include sexual harassment.

To make out a prima facie case of retaliation under Title VII, it must be shown:

> (1) that plaintiff engaged in an activity protected by Title VII;
> (2) that the exercise of his civil rights was known by the defendants;
> (3) that, thereafter, the defendant took an employment action adverse to the plaintiff; and

> (4) that there was a causal connection between the protected activity and the adverse employment action.

Wrenn v. Gould, 808 F.2d 493, 500 (6th Cir. 1987), cert. denied 484 U.S. 1067 (1988).

In order to invoke the opposition clause, plaintiff must show that he was the victim of retaliation "because he has opposed any practice made an unlawful employment practice by this [Title] [.]" Plaintiff claims that Canter and Morris retaliated against him because of his complaints about the drawing Haywood left on his computer and the deletion of files from his computer. In his complaints, plaintiff referred to the drawing as pornographic and he characterized the deletion of files from his computer as harassment but he never articulated a specific complaint of sexual harassment. He said nothing which would alert his employer to the fact that he believed that he was being discriminated against because of his sex or that there was a gender-based motive for what had occurred. Plaintiff may have believed in his own mind that there was a gender-based motive because of the comments made by Haywood in 1993 about his perceived sexual orientation, but he never told Canter or Morris about Haywood's earlier comments. Plaintiff may have attached special significance to the "Tits" drawing in light of the fact that unknown individuals had been placing photographs of naked men and women in his personal toolbox, filing cabinet and desk drawer over a period of two years but, again, he said nothing about this to Canter or Morris. The appearance of Haywood's computer drawing would not, in itself, have led Canter or Morris to suspect that Haywood had a gender-based motive for what he did.

"A vague charge of discrimination . . . is insufficient to constitute opposition to an unlawful employment practice." Booker v. Brown & Williamson Tobacco Co., Inc., 879 F.2d 1304, 1310 (6th Cir. 1989). In Booker, plaintiff asserted a retaliation claim under Michigan's Elliott-Larsen Civil Rights Act, which contains prohibitions against discrimination and retaliation similar to those contained in Title VII's Section 704(a). Plaintiff, a black male, was demoted from his position as a division sales manager because of alleged deficiencies in his management style. Plaintiff's supervisor had given him a letter detailing complaints about his managerial style and warning him that he would be terminated or demoted if he did not improve. Thereafter, plaintiff sent a letter to the head of Brown & Williamson's Human Resources Department disputing the complaints about his managerial style and claiming, "This is a case of ethnocism, which should be investigated immediately." Id. at 1309. Booker contended that this letter was a significant factor in his subsequent demotion and he asserted a claim of unlawful retaliation under the Michigan Act. The court concluded that Michigan courts look to Title VII in resolving questions arising under the Michigan Act and analyzed plaintiff's retaliation claim as though it had been asserted under the opposition clause of 42 U.S.C. §2000e-3a. Id. at 1311-1312.

The court, id. at 1313, concluded that Booker's letter did not constitute opposition to a violation of the Act, and thus did not fall within the opposition clause.

> An examination of the letter indicates that it is not in opposition to a violation of the Act. Booker was not contesting any unlawful employment practice; he was contesting the

correctness of a decision made by his employer. Booker generally attempts to dispute the employer's position with regard to his managerial style, and he suggests that the focus of the company's inquiry should be on his supervisor, Pavona.

There are only two possible allegations in the letter that suggest Booker may have been contesting an unlawful employment practice. Booker suggests that Pavona may be a racist due to a statement he allegedly made. However, the allegation is not that Brown & Williamson is engaging in unlawful employment practice, but that one of its employees has a racial intolerance.

The only possible suggestion of opposition is when Booker alleges that the charges against him are a result of "ethnocism." (Footnote omitted). Assuming that Booker intended discrimination, we hold that a vague charge of discrimination in an internal letter or memorandum is insufficient to constitute opposition to an unlawful employment practice. An employee may not invoke the protections of the Act by making a vague charge of discrimination. Otherwise, every adverse employment decision by an employer would be subject to challenge under either state or federal civil rights legislation simply by an employee inserting a charge of discrimination. In our view, such would

> constitute a intolerable intrusion into the workplace. Thus, since Booker's letter of August 26, 1985, does not fall under either the participation or opposition clauses, he has failed to state a cause of action.

Booker was followed and applied by the United States District Court for the Northern District of Ohio in Primes v. Reno, 999 F.Supp. 1007, 1015-1016 (N.D. OH. 1998), where the court held:

> Like the plaintiff in Booker, plaintiff here offered vague suggestions of racism as one possible explanation of what he perceived as a poor evaluation, but this is not sufficient to constitute "opposition" under Title VII and cannot form the basis for a retaliation claim.

Title VII is not a general "bad acts" statute. See Holder v. City of Raleigh, 867 F.2d 823, 828 (4th Cir. 1989). It does not authorize courts to declare unlawful every arbitrary and unfair employment decision. Id. Its protections are limited specifically to "race, color, religion, sex, or national origin." In Balazs v. Liebenthal, 32 F.3d 151 (4th Cir. 1994), plaintiff claimed that he was the victim of retaliation for having filed an EEO charge claiming that he had been demoted "due to a charge of sexual harassment" and that "I believe that I have been discriminated against because of my sex, male." In his subsequent suit for retaliation, he alleged that his EEO charge of discrimination was based on the false claim that he had sexually harassed other employees. The court, 32 F.3d at 159, held that plaintiff's initial EEO charge did not relate to

activity covered by Title VII and thus, would not support a subsequent claim for retaliation.

> In this case the plaintiff's claim as first filed with the EEOC simply alleged that he had been accused of doing something - sexually harassing his co-workers - which he did not do. It had nothing to do with his race, color, religion, sex or national origin. The EEOC had no more jurisdiction of this claim than it would have had of a charge that defendant had falsely accused him of reckless driving in the company parking lot.

In Crowley v. Prince George's County, Maryland, 890 F.2d 683 (4th Cir. 1989), plaintiff claimed that his position as a county employee was downgraded in retaliation for his involvement in the investigation of racial harassment claims against the county police department. The court noted that plaintiff did not claim that he had been retaliated against for investigating discriminatory employment practices within the police department, but instead, for investigating instances of racial harassment perpetrated by police officers against members of the community. The court held that such a claim was simply not cognizable under Title VII. 890 F.2d. at 687.

In Johnson v. Honeywell Information Systems, Inc., 955 F.2d 409 (6th Cir. 1992), plaintiff was employed as a field relations manager. About a year prior to her dismissal, she had complained in a memorandum sent to her supervisors that a certain regional manager from marketing had discriminated against her as a result of her confrontations with him over his failure to meet affirmative action goals. The

court, id. at 416, held that this alleged discrimination did not come within the protection of the Elliott-Larsen Act because affirmative action is not required under the Act, stating that "[s]ince the complaints lodged by Johnson in the interoffice memorandum did not relate to violations of the Elliott-Larsen Act, they are not protected 'opposition' activity." See Holden v. Owens-Illinois, Inc., 793 F.2d 74, 746 (6th Cir. 1986).

Plaintiff's complaints about Haywood's computer drawing and the deletion of files from his computer did not constitute opposition to activity prohibited by Title VII and cannot form the basis of a retaliation claim under the Act. Defendants are entitled to summary judgment on plaintiff's retaliation claim.

CONSTRUCTIVE DISCHARGE

In order to establish that he was constructively discharged, plaintiff must demonstrate that his working conditions were so intolerable that a reasonable person under the circumstances would have felt compelled to resign. See Noyes v. Channell Products, Inc., 935 F.2d 806 (6th Cir. 1991); Easter v. Jeep Corp., 750 F.2d 432 (6th Cir. 1982). Proof of discrimination or sexual harassment alone is not a sufficient predicate for a finding of constructive discharge; there must be other aggravating factors. Furthermore, plaintiff must make a threshold showing that the employer engaged in intentional discriminatory practices where the claim of constructive discharge is part of the alleged damage resulting from the alleged claimed sexual harassment. "[A] determination of constructive discharge necessarily rests on a

finding of discriminatory intent." Lynch v. Freeman, 817 F.2d 380, 385 (6th Cir. 1987).

Plaintiff has failed to produce sufficient evidence to create a genuine issue of material fact on the question of whether his working conditions were so intolerable that a reasonable person would have felt compelled to resign. He has also failed to show that a genuine issue of fact exists on his allegation that he was forced to resign because of sexual harassment. Accordingly, his constructive discharge claim fails as a matter of law.

LIABILITY OF INDIVIDUAL DEFENDANTS HAYWOOD AND CANTER

Supervisors and co-employees are not subject to individual liability under Title VII. Wathen v. General Electric Company, 115 F.3d 400 (6th Cir. 1997). However, under Ohio law, supervisors may be held jointly and/or severally liable with the employer for discriminatory conduct which violates Ohio Revised Code Chapter 4112. See Genaro v. Central Transport, Inc., 84 Ohio St.3d 293 (1999). The record shows that neither Haywood or Canter ever occupied a supervisory position. At one time or another, each of them occupied the position of team leader. The function of a team leader was to expedite the work of the team and to act as a liaison between the team members and the manager of the department. A team leader would relay information to the department manager and convey to the department manager any issues or concerns the members of the team might have. This would include such things as requests for leave and the scheduling of vacations. A team leader had no authority to

hire, fire or discipline employees or to take any action which would affect their conditions of employment.

Haywood was a team leader in 1990 or 1991 but, in 1993, when he allegedly made comments about plaintiff's sexual orientation, plaintiff was the team leader and Haywood was a member of the team. There is no evidence that at any time thereafter, Haywood was plaintiff's team leader, although he may have been a team leader on a different shift. There is no genuine issue of material fact regarding Haywood's liability for any of plaintiff's claims and he is entitled to judgment as a matter of law.

Canter was plaintiff's team leader when he complained about the "Tits" drawing. It appears that at this time, Canter had been given additional authority and responsibility beyond that of a team leader because of the absence of Parsons, who was then on sick leave. During this period of time, Canter reported directly to Morris, the vice president of production. Cary Depo., p. 72. The evidence raises a genuine issue of material fact on the issue of whether Canter was plaintiff's supervisor during the period of the alleged retaliatory activities. Canter is, nevertheless, entitled to judgment as a matter of law because plaintiff has failed to show that a genuine issue of fact exists regarding Canter's alleged liability for retaliation.

NEGLIGENT SUPERVISION

Plaintiff's complaint includes a claim entitled "Negligent Supervision." See Second Claim for Relief, Complaint, p. 9. Under Ohio law, an employee may assert a claim of negligent supervision where he is the victim of

tortious conduct by a co-employee and he can show that his injury was a result of his employer's failure to act "reasonably and prudently in supervising its employees." See Retterer v. Whirlpool Corp., 111 Ohio App.3d 847, 677 N.E.2d 417 (1996). Plaintiff has failed to produce sufficient evidence that any employee of ABB was guilty of tortious or any other form of legally culpable misconduct directed toward him or that ABB was aware of any such conduct by its employees which it could have prevented through reasonable and prudent supervision. ABB is entitled to summary judgment on this claim.

NEGLIGENT AND INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

The fourth claim for relief asserted in the complaint is a claim of intentional and/or negligent infliction of emotional distress. Ohio does not recognize a cause of action for negligent infliction of emotional distress in the employment context. See Hanly v. Riverside Methodist Hospital, 78 Ohio App.3d 73, 83 (1991); Hatlestad v. Consolidated Rail Corp., 75 Ohio App.3d 184, 191 (1991); and Antalis v. Ohio Dept. of Commerce, 68 Ohio App.3d 650, 654 (1990).

In Yeager v. Local Union 20 Teamsters, Chauffeurs, Warehousemen, & Helpers of America, 6 Ohio St.3d 369, syllabus para. 1, 453 N.E.2d 666 (1983), the Ohio Supreme Court recognized a cause of action for intentional infliction of emotional distress, stating:

> One who by extreme and outrageous conduct intentionally or recklessly causes serious emotional distress to another is subject to

> liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

The court, 453 N.E.2d at 671, adopted the definition of "extreme and outrageous conduct" from comment d to Restatement of the Law 2d, Torts (1965) 73, Section 46, which reads in part as follows:

> It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice" or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.

Plaintiff's evidence does not raise a genuine issue of fact on the elements of his claim of intentional infliction of emotional distress. ABB is entitled to summary judgment on plaintiff's claims of negligent and intentional infliction of emotional distress.

CONCLUSION

Defendants' motion for summary judgment is granted. The Clerk shall enter final judgment for the defendants

dismissing plaintiff's complaint, with prejudice, at plaintiff's costs.

It is so ORDERED.

/s/_____
JAMES L. GRAHAM
United States District Judge

DATE: October 13, 1999

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Filed October 13, 1999]

No. C-2-98-463

Jeffrey Plummer,
Plaintiff,

vs.

ABB Industrial Systems, Inc., et al.,
Defendants.

Judge James L. Graham

JUDGMENT IN A CIVIL CASE

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[ ] **Decision by Court.** This action came to trial before the Court. The issues have been tried or heard and a decision has been rendered.

[X] **Decision by Court without trial or hearing.**

IT IS ORDERED AND ADJUDGED that defendants' motion for summary judgment is GRANTED. Final Judgment is hereby entered in favor of the defendants. Plaintiff's complaint is dismissed with prejudice and the costs of this action are assessed against the plaintiff.

October 13 , 1999
Date

KENNETH J. MURPHY
Clerk

/s/_____
Deputy Clerk

APPENDIX D

SAMPLING OF WORKPLACE PORNOGRAPHY

[Fold out]

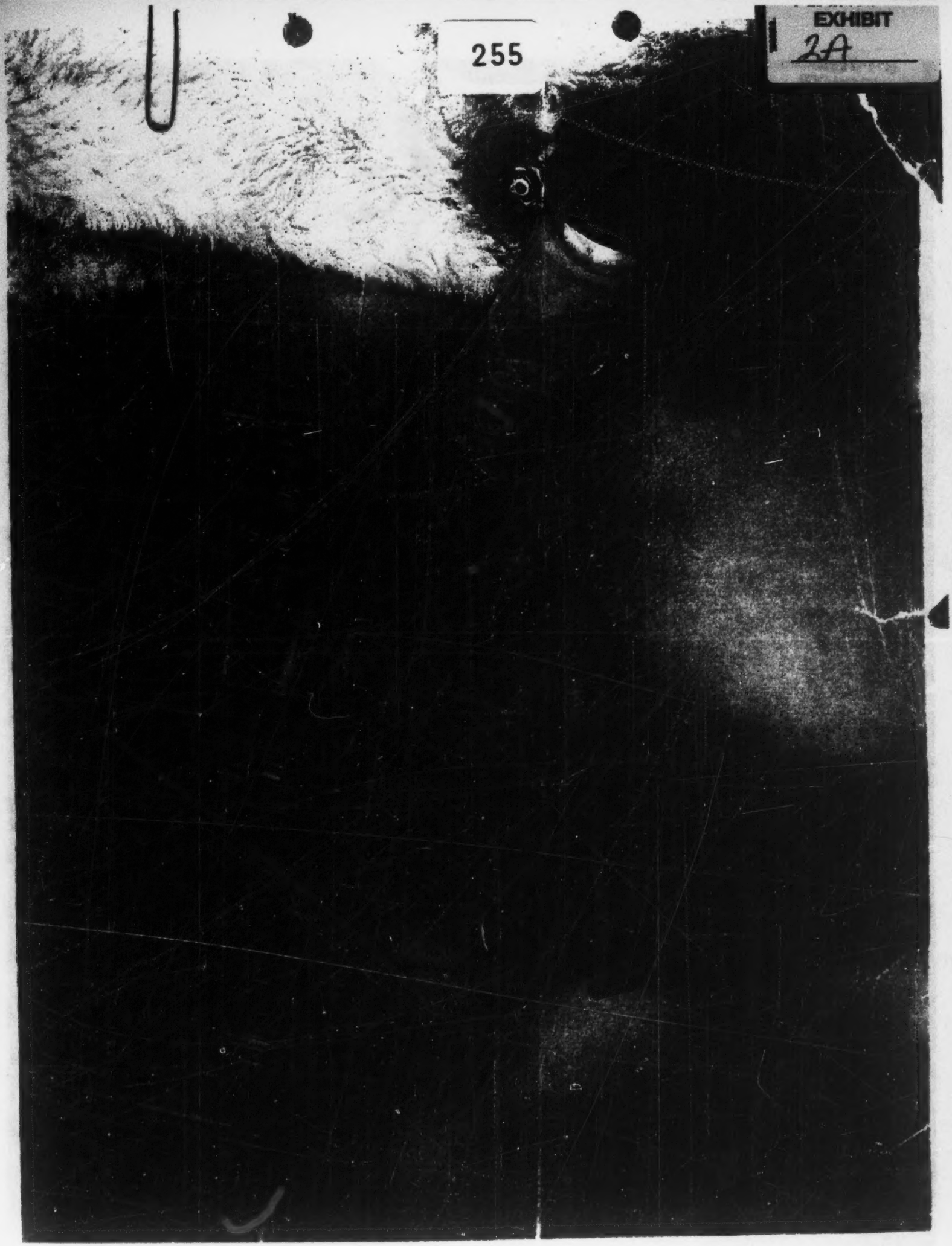
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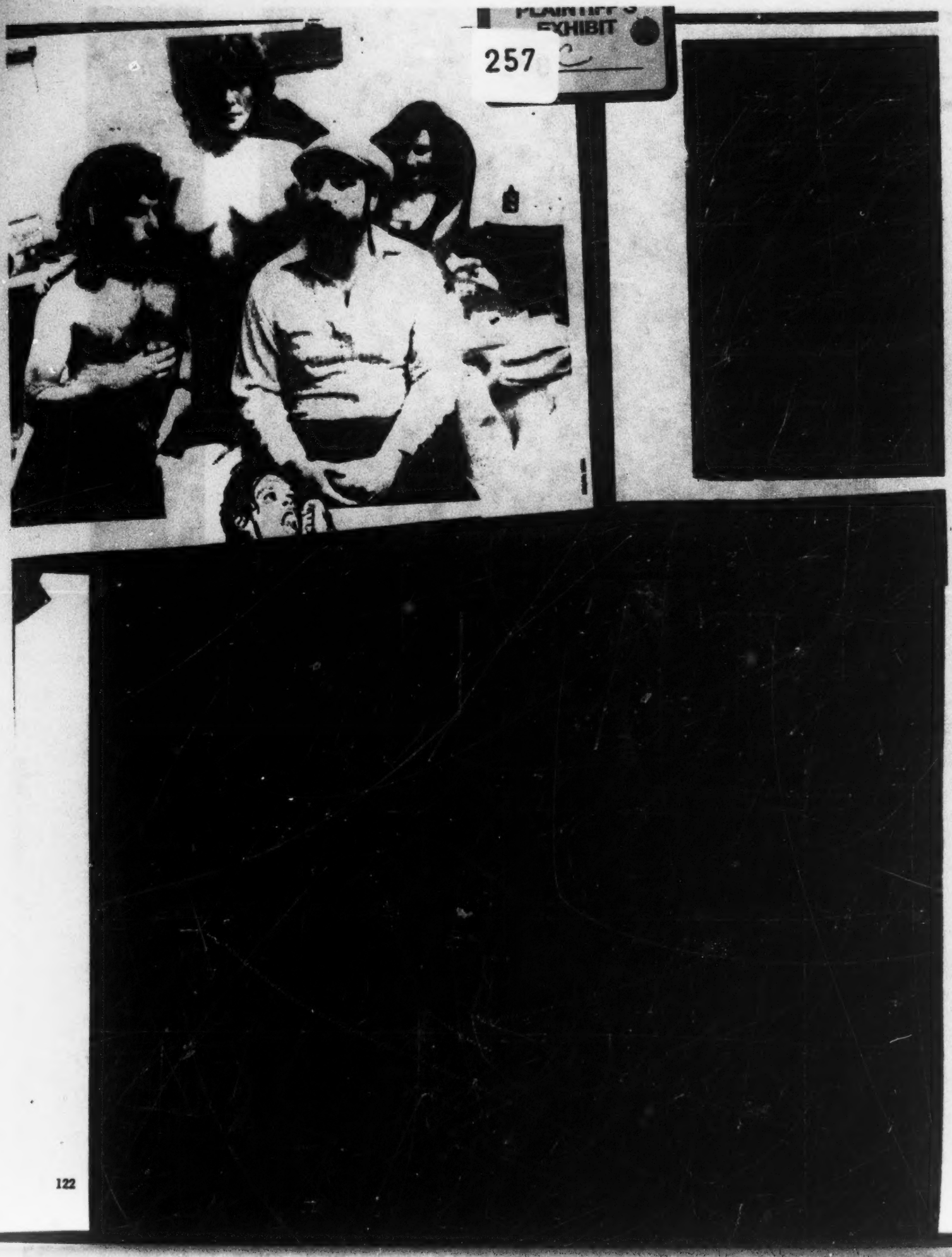
EXHIBIT
2A

256
PLAINTIFF'S
EXHIBIT
28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257

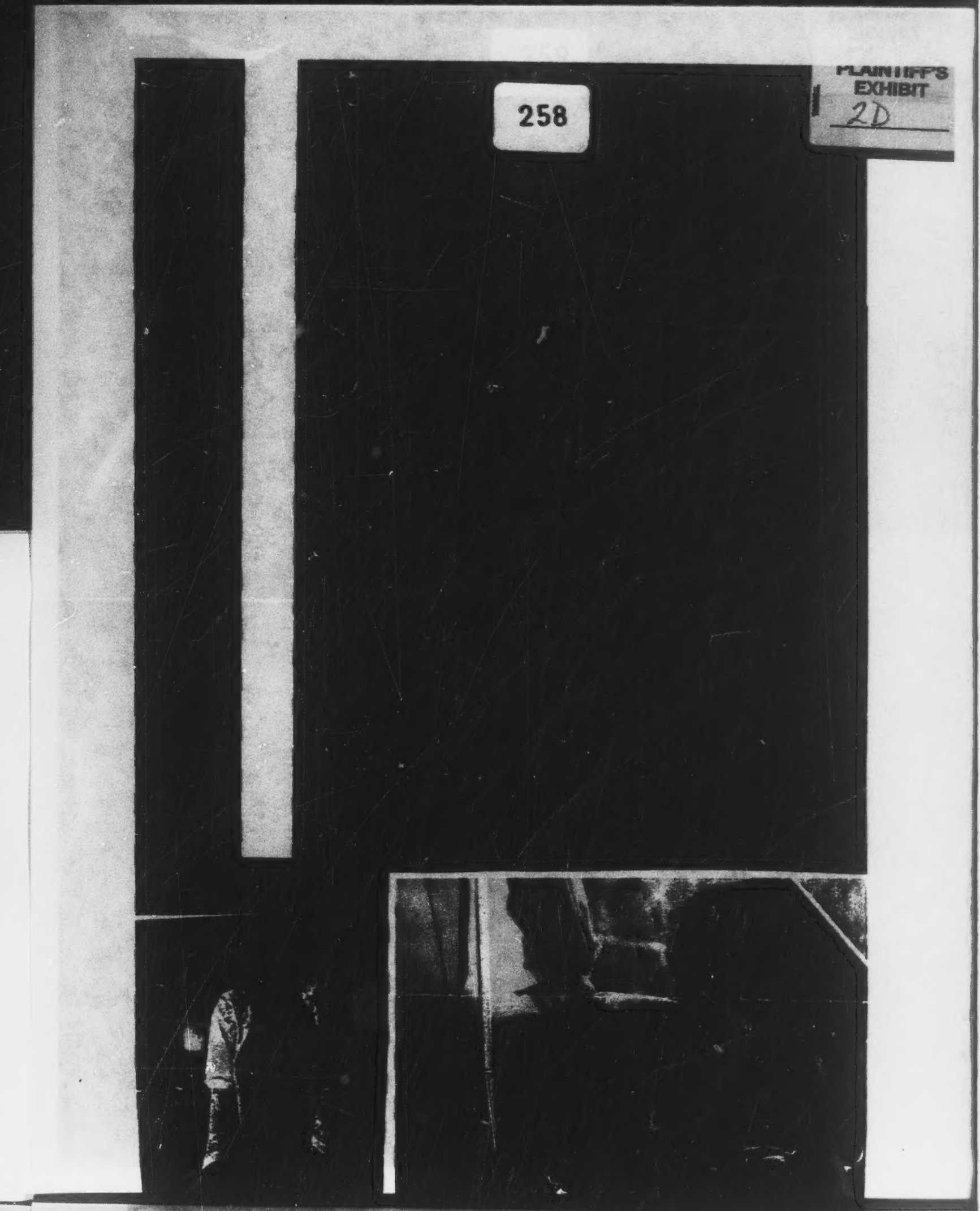
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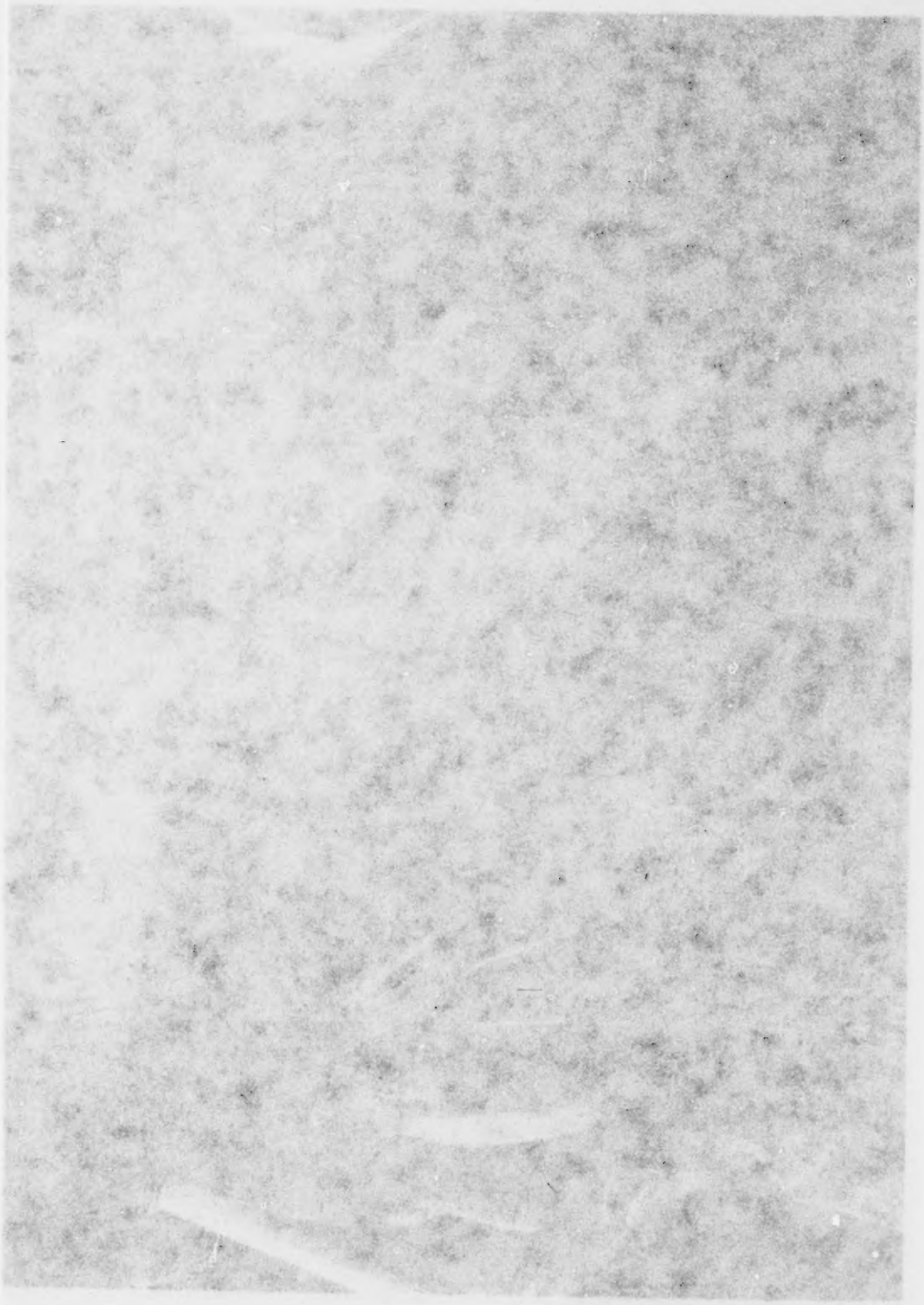
EXHIBIT
2D

259
PLAINTIFF'S
EXHIBIT
2E



APPENDIX E

COMPUTER "TITS" DRAWING

[Fold out]

TITS

254

EXHIBIT 1

DEPOSITION

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Filed July 15, 1999]

No. C2-98-463

JEFFREY L. PLUMMER,	)
Plaintiff,	)
	)
vs.	)
	)
ABB INDUSTRIAL SYSTEMS,	)
INC., et al.,	)
Defendants.	)
	)

JUDGE GRAHAM

MAGISTRATE JUDGE KING

AFFIDAVIT OF JEFFREY L. PLUMMER

STATE OF OHIO)
) SS:
COUNTY OF FRANKLIN)

I Jeffrey L. Plummer, first being duly cautioned and sworn, do hereby depose and state as follows:

1. I began employment with ABB Industrial Systems, Inc ("ABB") on January 15, 1990. I was hired as a machinist in the company's metal fabrication division. I was laid off in June, 1990 and returned to work at ABB in November 1990. I returned to work at ABB through Tailored Management, an employee leasing agency and worked through Tailored Management as an ABB employee until January 1995. During my employment with ABB I have always worked at the ABB Columbus Facility. ABB retained supervisory and managerial control over me and the work I performed on behalf of ABB, through their work rules, policies and training certifications which at all times governed my employment while working at the ABB facility. I was always supervised by ABB employees or Tailored representatives acting on ABB's behalf. I worked for ABB as a Principal Operator, Team Leader and Programmer until I was forced to quit my employment on July 31, 1996.

2. The harassment against me while working at ABB was always present but got worse in late 1992 and in 1993. My supervisor at that time, Dohn Haywood, began instigating conflict between co-worker Paul Schreiber and myself. At first it appeared harmless. Then it escalated and got out of control. At first, since Haywood was my boss, I felt I would just have to put up with it. However, Haywood crossed the line and started doing some very disgusting things. Dohn Haywood was responsible for putting what I believe

was semen on my tool box. He also wrote a note on my tool box which I saw in his hand writing saying "dick cheese". I believe, he also put human feces in my tool box and in Paul Schreibers. Schreiber also worked the line. Paul Schreiber would put ear wax that he had collected in a vile and then rub it all over my tool box, and would collect pus from popping zits on his nose and put it on my tool box. He did other sexually related acts as well. I complained to three ABB supervisors, Dohn Haywood, Bruce Mossgrove and Maurey Parsons about these gross sexually related actions and they did nothing.

3. In June 1993, I became Haywoods 3rd shift supervisor. As Haywood's supervisor I confronted him about his obsession in reading and viewing pornographic materials while on company time. I told Dohn that I didn't want him reading any more pornographic magazines while he was working because it was not appropriate to read these magazines while at work. He then questioned my sexual preference, I assume because I was a male and didn't approve of that type material. He asked me why I was "almost 30 years old and not married and had no kids" He remarked "what? Are you gay?". I told him that it didn't matter if I was gay or not, I didn't want him to read them anymore while running the machine. The harassment continued. After that Don Hustead and Dohn Haywood were together talking at the machine as I was walking by and I heard Dohn Haywood say to Hustead that "There goes a fag".

4. In August, 1993, I spoke with Maurey Parsons (Process Owner & my boss) about Dohn's performance and also told him that I didn't think we should allow Dohn or anyone else to bring in pornographic magazines to read while working. I also told him that we should take down all the nude pictures and calendars of women that were hanging in the shop. Maurey stated to me very assertively to drop it. He also told me that I had a very promising career and not to do anything to jeopardize it. He said it was an all male shop and this kind of behavior had to be tolerated.

5. I was continually harassed throughout my employment with ABB. From 1993 and afterward, through July 31, 1996 when I was forced to quit, it was especially bad. I would find numerous pornographic photos in my desk, tool box, and other of my personal belongings. At first I thought I could tolerate it, but it got so distracting and offensive that I couldn't take it. At first I did not talk about it, because I was of afraid of losing my job based upon earlier comments by Maury Parsons and other supervisors. However, in 1993 I did report the pornographic pictures and complained about the work environment to Parsons but he did nothing and threatened me even more with losing my job. I personally saw pornographic pictures and materials of completely nude women in the ABB facility up through the time I was forced to quit. The pornography and materials were identified in my deposition and in other depositions.

6. Because of the offensive conduct of the ABB supervisors and employees, the sexually demeaning conduct towards me apparently because 1 did not fit the stereotype of a "male" in a shop and the work environment with all the offensive pornographic materials; working in that ABB environment throughout my employment was offensive, demeaning, degrading and debilitating.

7. In August 1995, Dohn Haywood drew a pornographic pair of female breast or "tits" on my ABB personal programming computer. This drawing was offensive, demeaning, harassing and intended to question my sexuality and to berate my presumed sexual preference. The next day I found the drawing on my computer. This was pure harassment based on my sex. This was like the final straw after the gross acts in 1993, being called a "Fag" and "Gay" and the years of constant harassment and not being able to do anything about it because management made it clear that it was an environment I should tolerate and keep my mouth shut or lose my job. I immediately went to Russ Hartley, a team leader in charge of office personnel, and told him about it. He thought it was funny. I told him I wasn't going to put up with this and he told me to go to Dick Canter because Canter was in charge of shop personnel. When I went to Canter and explained about the harassment, he said I was overreacting and I needed to prove who did it. I went back and got the information he needed to prove it and told him that Hustead confessed to me that he witnessed Dohn Haywood do it. Canter said he wasn't going to do anything, not even talk to Haywood about

it. After finding other problems with my computer, like critical files deleted, I went back to Canter and asked him to do something about this. He refused. When I told him I would go over his head to Human Resources, he threatened me by indicating that, I hadn't been in my position very long and I didn't need this problem, but if I felt that strongly about pursuing this, then I should go to Human Resources but "there will be strong repercussions by me if you do." I took this as a direct threat to my job. I told him I didn't have a choice my job was already at stake.

8. I waited until Maurey Parsons returned from sick leave and complained to him about the harassment and "TITS" drawing. He said I was overreacting and that he wasn't going to do anything about it. He reminded me of what he had told me earlier about tolerating this kind of conduct and jeopardizing my career. So after going to three (3) managers and since nothing was going to be done about it not even an investigation or even talking to Haywood, I used the Open Door Policy to report violations of the Defendants' sexual harassment policy, and went to Human Resources with two (2) other employees. After that the harassment got worse.

9. In February 1996 I suffered a severe injury. I fractured and dislocated my thumb out of my wrist. I was not supposed to work for a minimum of 6 weeks. ABB called me and my doctor a number of times requesting that I come back to work early. These were harassing calls. The doctor released me to return to work early based on indications from the company

that I would not have to use my right arm or hand for anything. The company did not honor these work restrictions, and my arm and wrist got worse. I made the company aware of this. I then received a call from Human Resources telling me that Ken Morris (V. P. of the company) wanted to see me. In the meeting I told them (Ken Morris and Dick Canter) that I would get a doctors excuse if they wanted me to and they told me that would not be necessary, but if I missed any more work, doctor excused or not, I would not be needed by the team and I would no longer have a job. I once again took this as a direct threat to my job. I was certainly being treated differently than the others. No other employee was put under this type pressure after sustaining such injury. I knew they were after my job.

10. Also during this time ABB was doing their 1st ever 360 review. I was absent because of my injuries so I could not participate. Even though I was absent Dick Canter made sure I was included in the review. He made sure that I was put in a work cell were I would be reviewed by Dohn Haywood, Don Hustead, and himself who got to evaluate me twice, once as a team mate and once as the Process Owner or boss. That way they had control over 60% of the score. Needless to say they scored me very low. Even other people in the department couldn't believe that Canter did what he did.

11. Then after I came back from my leave of absence I had a meeting with Ken Morris and Dick Canter about the 360 review results. I told Morris that Canter set

me up on my 360 Review. That's when Ken Morris told me that I would have to do another review to try to improve my score. He said that if my score didn't improve to his expectations that I "would be like the cows in Europe that had the Mad Cow Disease and I would be terminated" I took this as direct threat to my job. No other employee was required to do another 360 Review under such circumstances.

12. After doing another review exactly as I was instructed, by Bill Bertch, a Process Owner in charge of my second review the results were better. Morris started avoiding me and refused to schedule a meeting until I finally basically begged him. At the meeting Morris accused me of fixing the results and manipulating the review even though it was exactly how I was instructed to do it. Morris refused to believe any of the results and got very upset with me. I told him that ever since I went over Dick Canter's head and bothered him with the sexual harassment I encountered, culminating in the TITS drawing, I had threats regarding my employment, management was doing everything in their power to get rid of me. He told me that he never wanted me to bring up Dohn Haywood's name again and that I obviously didn't know who was the man controlling my life. He said "I am God in your world, everything you have and are able to do I control. I can give it or take it away at my own will", I told him that "You may be God in every other person's world that works at ABB but you are not God in mine" Then he said that it was time to head in a new direction with me. I didn't find out what that direction was until later when Mike Sallows called me

in his office on 07-30-96 and gave me five bogus reasons why they could fire me.

13. The computer tampering didn't stop, in fact it kept getting worse. The day before I was forced to quit I was called in the office to defend myself from being accused of purposely deleting files. Some of these files were actually deleted because of someone else tampering with my computer and the other files were the same files that were deleted the previous year.

14. I began to realize that if I didn't quit they were going to find some way of firing me. In fact the last conversation I had with Ken Morris he bragged that there was only two ways I could leave the company, quit or get fired. I soon came to realize that no matter how good you are at your job and how well you get along with other workers if you use the Open Door policy and go over your boss's head you have no rights at least at ABB. Management can lie, slander you, sexually harass you, threaten your job, harass you, destroy your credibility, hold disciplinary meetings without your right to have a witness and there is nothing you can do about it, at least not internally at ABB.

15. On 7/31/96 once again someone tampered with my computer and I knew they would try to blame me and possibly try to fire me again for it. I had reached my breaking point and could no longer take the harassment. I was forced to quit.

16. Team leaders act as supervisors at ABB and have substantial input into hiring and firing decisions. I acted as such when I was a team leader. I disciplined and evaluated employees, discharged an employee, had the pay of an employee reduced, hired employees, assigned job duties to employees on a regular basis and performed a number of other supervisory duties as a team leader. Dick Canter also as a team leader was a supervisor. Dick Canter came to me once to hire 2 new employees needed in Metal Fab. He asked me to help him interview prospective people and to go over some applications and I agreed. Dohn served as my team leader/supervisor during several periods of time during my employment from 1990 to 1996. He also performed the duties of a supervisor during those times.

17. Once when reviewing applications for employment at ABB with Dick Canter I witnessed him throwing two applications in the trash just because the applicants were female. When I asked him about it, he told me that he didn't need any women corrupting his shop.

18. During the time I worked at ABB from 1990 to 1996 there was never more than one or two females working fulltime in the Metal Fabrication shop at any given time, although there were always more than thirty (30) males. It wasn't because there weren't any women qualified, they just didn't hire women into metal fab. This situation promoted a sexually charged and hostile working environment in metal fabrication.

19. As a result of defendants' sexually related harassment, based on my sex (male), discrimination, retaliation, and other conduct, I have sustained economic loss in the form of lost wages, other benefits, pain, suffering and other damages.

20. Because I am male I was expected to tolerate and was told by management to tolerate the sexually charged environment with all the pornography and gross sexually related conduct, by not only other employees, but supervisors and management. This was wrong. Lack of action by management after I informed management on numerous occasions was also wrong. A female never would have been treated this way.

21. During the entire course of my employment at ABB under the direction and control of Defendant ABB supervisors and its employees or other representatives acting under ABB's control, I was subjected to repeated, ongoing, and continuous acts of discrimination and harassment based on my sex (male), and was otherwise subjected to a hostile environment created by ABB, Dick Canter, Dohn Haywood and other supervisory and managerial employees at ABB.

22. Based upon the actions set out in this affidavit and the manner in which I was treated differently than other employees at ABB, I filed a charge of discrimination with the Ohio Civil Rights Commission (OCRC) and Equal Employment Opportunity Commission(EEOC) on January 14, 1996.

23. I received a "Notice of Right to Sue", dated February 3, 1996, from the EEOC.

24. Because I had been discriminated against on the basis of my sex (male), wrongfully constructively discharged, suffered emotional distress throughout my employment and afterwards and negligently supervised to say the least, I filed a legal action against ABB, Dick Canter and Dohn Haywood on May 1, 1998.

FURTHER AFFIANT SAYYETH NAUGHT.

/s/_____
Jeffery L. Plummer

Sworn to before me and subscribed in my presence this 15th day of July, 1999.

/s/_____
Notary Public

[Seal]

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Filed June 1, 1999]

No. C2-98-463

Jeffrey L. Plummer,
Plaintiff,

vs.

ABB Industrial Systems, Inc., et al.,
Defendants.

DEPOSITION OF DERYCK D. RICHARDSON, PH.D.

Taken at the offices of Deryck D. Richardson, Ph.D.
1425 East Dublin-Granville Road
Columbus, Ohio 43229
May 20, 1999, 9:15 a.m.

*****

A. Correct. It's the upper edge of serious symptoms.

Q. More towards the moderate?

A. Right. I see him as moderate to severe. So I was selecting a code that -- a number that fit in with that.

Q. In your opinion, does Mr. Plummet suffer from severe emotional problems?

A. I would say moderate to severe.

Q. But not severe emotional problems?

A. I don't want to split hairs but major depression is a severe disorder that you don't diagnose unless you've got sufficient signs and symptoms to substantiate it.

Q. Did you have sufficient signs and symptoms to substantiate him as severe?

A. As moderate to severe, yes. Let me say that overall I would see him as probably more moderate than severe, if we're looking at severity going from mild, moderate to severe severity but looking at -- that's along a continuum of severity.

Q. When people have severe emotional problems, it's usually recommended that they complete assessment or if he was not going to come back in, then I could go ahead and send whatever I had without having to delay it any further.

MR. FERBER: I'm getting down to the end here. If you give me just a minute, I can go through my notes.

(Off the record.)

Q. Dr. Richardson, did you observe any physiological problems with Mr. Plummer?

A. Physiological in the sense that he was often tense and somewhat jittery.

Q. Other than that?

A. But other than that, no.

Q. You mentioned earlier that there were various stressors which you identified that you believe were attributable to Mr. Plummer's emotional state.

A. Yes.

Q. Did you make any determination as to which of those stressors were primary or secondary?

A. I don't have a written determination on that. Based on his self-report to me the primary one would be the loss of the job at ABB because in his report everything else followed from that.

Q. Was it the loss of the job or what occurred to him at ABB, as he reported it?

A. I'm sorry, I'm using that term inclusively. Let me be more specific. You're quite correct. The events leading up to his ending his employment at ABB and the ending of that and what he has seen as ongoing issues that keep it alive for him; for example, once in my senses it was sometime recently, this was one of the areas I could not pin him down on and decided that it wasn't important enough to pursue, but he was in a bar and apparently someone he had known from ABB came over to him and said, "I don't care if you're gay. That doesn't matter to me. And the managers and everybody at ABB is saying that about you, but that's okay." And this was said in front of other friends, acquaintances of his.

Q. This was just some coworker?

A. Right.

Q. At a bar?

A. Right. So, I mean, it's been those sorts of things that have helped to keep that alive in his head. . . .

Supreme Court, U.S.
FILED
MAR 9 2001
CLERK

No. 00-1275

In The

Supreme Court of the United States

JEFFREY PLUMMER,

Petitioner,

v.

ABB INDUSTRIAL SYSTEMS, INC., DON HAYWOOD, AND DICK CANTER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING

The Parties to this Proceeding are those named in the Caption of this case. The employer has operated under several different legal names since Petitioner began his employment in January 1990. The corporate entity named in this action, ABB Industrial Systems, Inc., no longer exists, and the Company's facility in Columbus, Ohio, where Petitioner worked, is now called ABB Automation Inc.

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STATEMENT OF THE CASE

The facts presented to the United States District Court for the Southern District of Ohio, Eastern Division, and the United States Court of Appeals for the Sixth Circuit are straightforward. The District Court accurately restated these facts at pages 6 through 17 of its Decision. [Petition Appendix pp. 6a-17a.][1] Briefly stated, Petitioner's employment with ABB began on January 15, 1990, when he was hired as a Machinist in the Company's Metal Fabrication Division (which translates blueprints into metal fabricated parts), and ended on July 31, 1996, when he resigned. The gravamen of Petitioner's lawsuit against Respondents is that he was subjected to a sexually hostile work environment during the five years that he worked for ABB; that the Company retaliated against him for complaining about this environment; and that, as a result, his working conditions became so intolerable that he was forced to resign his position.

The factual basis Petitioner offers in support of his claims consist of the following:[2] First, Petitioner asserts that, sometime in 1993, Respondents Haywood and Hustead (Petitioner's fellow employees), inappropriately asked him about his sexual orientation. Second, Petitioner claims that visual materials, which he considers to be

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[1] All references to Appendix pages refer to the Petition's Appendix.

[2] The facts set forth in the Petition are, in many respects, manifestly at odds with those related by Petitioner in his deposition, and become more embellished by Counsel as this case has progressed. Indeed, Petitioner concedes that there may be "some conflict" between his deposition testimony and other evidence he presented to the District Court. [Petition p. 18.]

*pornographic, were placed in his work station and throughout the general work areas at ABB. Petitioner claims that, sometime in 1993, he complained to his supervisor, Maurey Parsons, that it was inappropriate to permit employees to hang nude pictures of women in the machine shop and to allow them to read *Playboy* magazines at work, and that he believed this conduct was interfering with people's work.

Aside from this one conversation with Parsons in 1993, Petitioner never reported his concerns to anyone in management or in Human Resources, nor did he ever take down any of the pornographic materials allegedly hanging in the shop. Further, Petitioner never told anyone at ABB that pornographic materials were being placed in the desk drawers at his work station. In fact, the first time Petitioner mentioned the existence of the materials allegedly placed in his work station was during his deposition in July 1998, two years after his employment ended. Petitioner also concedes that he does not know the identity of the person who allegedly placed these materials in his desk drawers, their motive for doing so, or whether it was done intentionally to harass him.

Third, Petitioner claims that, in August 1995, Respondent Haywood created a computer depiction of female breasts on the computer Petitioner and other ABB employees used. In October 1995, Petitioner reported his complaint about Haywood and the computer drawing to Mari Jo Cary, ABB Human Resource Manager. According to Petitioner, Cary told him that the matter would be investigated. Petitioner asserts that, on January 5, 1996, he met with Vice President Ken Morris and Supervisor Bill Bertch to report the computer drawing. However, the

itinerary for the meeting, and the written account made after the meeting, reveals that at no time did Petitioner tell Morris or Bertch that he thought the drawing was pornographic or that he thought Haywood was sexually harassing him. Rather, the account signed by Petitioner reveals his concern that, if Haywood had access to his (Petitioner's) computer, files might be deleted. Petitioner also concedes that after he reported these concerns to Cary and Morris, Haywood was reprimanded for making the drawing.

Fourth, Petitioner maintains that someone deleted files from the computer he used at ABB. However, Petitioner has no idea who deleted the files, why the person deleted them, whether it was done intentionally, or whether it was purposely done to harass him. When Petitioner reported his complaints regarding the missing files to Vice President Morris, the Company conducted an investigation into the files, but no one could determine that any files were actually missing.

Fifth, Petitioner asserts that Respondent Canter, along with two of Petitioner's supervisors, threatened his job after he complained to Human Resources about what he perceived to be harassing conduct directed at him. Petitioner asserts that, after he complained to Canter about Haywood's computer drawing and told him that he would report it to Human Resources, Canter advised Petitioner that "there would be strong repercussions" if he did so, which Petitioner interpreted to be a threat to his job. Despite Canter's alleged threat, Petitioner reported Haywood to Human Resources and never suffered any adverse action. Although Canter could not possibly have disciplined, demoted or terminated Petitioner (because Canter was not in a supervisory position

and did not have that kind of authority), Petitioner claims that Canter, in an effort to force Petitioner to quit, retaliated against Petitioner by causing problems for him at work.

As a result of Petitioner's low scores on his 360 Performance Review, he was required to meet with Vice President Morris to discuss the results of the review and the efforts Petitioner would need to take to improve his performance. In one of these meetings, Petitioner claims that he told Morris that the low scores on his review were a result of Haywood's and Canter's attempts to retaliate against him because of his complaint about the computer drawing. According to Petitioner, Morris told him that if he ever mentioned Haywood again, he would fire Petitioner. However, the undisputed facts reveal that Morris never fired Petitioner. To the contrary, he told Petitioner that, if his performance improved, he could have a future with ABB. Morris spent time counseling Petitioner because he thought Petitioner would be an asset to the organization if he could overcome some behavioral problems.

Petitioner also claims that he was retaliated against when Supervisor Mike Sallows threatened his job in July of 1996 – a short time before Petitioner voluntarily resigned on July 31 of that year. Petitioner alleges that Sallows gave him four reasons why he could fire Petitioner on the spot: (1) for wearing shorts in the shop, (2) for working overtime without permission, (3) for missing work, and (4) for deleting computer files. Petitioner alleges that Sallows threatened to move him to the third shift, but concedes that Sallows never did. The undisputed fact remains that Sallows never fired Petitioner,

and, like Morris, Sallows assured Petitioner that, if his performance improved, he had a future with ABB.

Finally, Petitioner asserts that, while he was on a medical leave of absence from work due to a non-work related hand injury, the Company harassed him to return to work before he was physically able. In early 1996, Petitioner suffered a hand injury in a motorcycle accident, and was placed on a medical leave of absence from work. During this medical leave, which lasted for more than five weeks, representatives from the Company contacted Petitioner to inquire as to when he would be able to return to work. When Petitioner told the Company's nurse to contact his doctor (Dr. Ralph Rohner) regarding his return to work, the Company contacted Dr. Rohner's office and asked him to examine Petitioner and determine when he could return to work and under what restrictions. The Company communicated with Dr. Rohner's office only on two occasions, the initial written request and one follow up request. Petitioner contends that Dr. Rohner told him that the Company wanted Petitioner back at work, even if just to counsel other employees. Based on the job description offered by the Company, Dr. Rohner released Petitioner to return to work, with certain restrictions. According to Petitioner, the Company was attempting to return him to work before he was physically ready, in an effort to harass him. However, Dr. Rohner testified that Petitioner's health was not compromised in any way by the release to return him to work, with restrictions.

On May 1, 1998, Petitioner filed this lawsuit against ABB, Haywood and Canter, alleging causes of action for: (1) "same-sex" sexual harassment and reverse sex discrimination under Ohio Revised Code Chapter 4112

(Ohio's anti-discrimination statute) and under Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e, *et seq.* ("Title VII"); (2) negligent supervision; (3) wrongful discharge; and (4) intentional and/or negligent infliction of emotional distress. Following extensive discovery, Respondents filed a Motion for Summary Judgment, on June 1, 1999, which was opposed by Petitioner. On October 13, 1999, the District Court issued an Opinion and Order dismissing Petitioner's claims. On November 2, 1999, Petitioner timely filed his Notice of Appeal to the United States Court of Appeals for the Sixth Circuit. On November 9, 2000, the Sixth Circuit issued a Memorandum Opinion and Order affirming the judgment of the District Court. Thereafter, Petitioner filed the instant Petition. For the reasons presented below, Respondent respectfully submits that the Court deny the Petition.

REASONS FOR DENYING THE PETITION

REVIEW SHOULD BE DENIED BECAUSE THIS COURT, IN *ONCALE*, ESTABLISHED THE EVIDENTIARY STANDARD FOR A SAME-SEX SEXUAL HARASSMENT CLAIM, AND THE DECISIONS OF THE LOWER COURTS IN THE INSTANT CASE DO NOT CONFLICT WITH THE DECISION OF THIS COURT IN *ONCALE*

Pursuant to Supreme Court Rule 10, "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion." "A petition for a writ of certiorari will be granted only for compelling reasons," such as where:

> A state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by

> this Court, or has decided an important federal question in a way that conflicts with the relevant decisions of this Court.

Sup. Ct. R. 10. Petitioner summarizes his argument in support of his petition as follows:

> Same-sex harassment occurs and is actionable. *Oncale v. Sundowner Offshore Services, Inc.*, 118 S. Ct. 998 (1998); *Yeary v. Goodwill*, 107 F.3d 443 (6th Cir. 1997). The elements developed to date to demonstrate same-sex sexual harassment were all satisfied in this matter: 1) the harassment complained of was because of sex; 2) the harasser is an unusual actor who discriminates against his or her own sex; 3) the employee was subjected to unwelcome sexual harassment; 4) the charged sexual harassment had the effect of unreasonably interfering with the Petitioner's work performance and creating an intimidating, hostile or offensive working environment; and 5) the existence of respondeat superior liability. *Griswold v. Fresenius USA*, 978 F. Supp. 718, 730 (1997) [sic]; *Yeary v. Goodwill*, 107 F.3d 443 (6th Cir. 1997) and *Oncale v. Sundowner Offshore Services, Inc.*, 118 S. Ct. 998 (1998). Although each of the elements were satisfied in this matter, the lower Courts none-the-less refused to allow the case to proceed to trial. Petitioner submits that the lower Court decisions were based on a reluctance to accept male on male sexual harassment as well as the fact that there is little guidance provided in this novel area for determining what constitutes an actionable same sex sexual harassment claim. Thus, the instant Petition for Certiorari has been filed in an attempt to secure further clarity in this area of the law.

[Petition p. 10.]

Petitioner has cited no legal authority to support these arguments. He presents no reasons why this Court should accept this same-sex sexual harassment case for review, nor any reason to set this case apart from any other sexual harassment case. Petitioner has cited neither contrary legal authority in the Sixth Circuit nor a split among the Circuits that would justify this Court allocating time on its limited docket to consider this routine sexual harassment case. In fact, Petitioner's argument for review is simply a rehash of his already rejected arguments as to why the District Court's decision was incorrect. He does not claim that the lower Court applied an incorrect legal standard; but, rather disagrees with its application of the facts. However, mere disagreement with a lower court decision is not grounds for Supreme Court review.[3]

A. The *Oncale* decision sets forth the standard for a viable same-sex sexual harassment claim.

Incredibly, Petitioner believes that:

> Although this Court in 1998 in *Oncale v. Sundowner Offshore Services, Inc.*, 118 S. Ct. 998, 1003 (1998), made it clear that [same-sex sexual harassment] claims are actionable, further guidance is now needed from this Court as to the circumstances under which an employer may be

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[3] Supreme Court Rule 10 provides: "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

> held liable for same sex sexual discrimination and harassment.

[Petition p. 9.] However, the evidentiary standard set forth in *Oncale* for a same-sex sexual harassment claim is clear. Indeed, this standard is the same one that applies to sexual harassment claims where the alleged harasser is the opposite sex of his or her victim. In making his groundless assumption regarding the understanding of the lower courts, Petitioner feigns ignorance of this Court's explanation in *Oncale* of the circumstances under which an employer may be held liable for same-sex sexual discrimination and harassment.

In *Oncale*, this Court resolved a conflict among the lower courts regarding the viability of a same-sex sexual harassment claim when it unanimously held that "sex discrimination consisting of same-sex sexual harassment is actionable under Title VII." 523 U.S. at 82. In reaching this determination, this Court observed that "Title VII prohibits 'discrimination . . . because of . . . sex' in the 'terms' or 'conditions' of employment. Our holding that this includes sexual harassment must extend to sexual harassment of *any kind that meets the statutory requirements.*" 523 U.S. at 79-80 (emphasis added). This Court also reiterated the now well-established rule of law that it set forth in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1992), that: " '[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, Title VII is violated.' " 523 U.S. at 78.

The respondents and their *amici* in *Oncale* argued to the Court that recognizing a cause of action for same-sex sexual harassment would "transform Title VII into a general civility code for the American workplace." *Id.* at 80. Rejecting this argument, the Court stated:

> [T]hat risk is no greater for same-sex than for opposite-sex harassment, and is adequately met by careful attention to the requirements of the statute. . . . 'The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.'

Id. (quoting *Harris*, 510 U.S. at 25). The Court further explained that:

> As we emphasized in *Meritor* and *Harris*, [Title VII] does not reach genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex. The prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in the workplace; it forbids only behavior so objectively offensive as to alter the 'conditions' of the victim's employment. . . . We have always regarded that requirement as crucial, and as sufficient to ensure that courts and juries do not mistake ordinary socializing in the workplace – such as male-on-male-horseplay or intersexual flirtation – for discriminatory 'conditions of employment.'

Oncale, 523 U.S at 81 (quoting *Harris*, at 21).

The Court stated that "the objective severity of harassment should be judged from the perspective of a

reasonable person in the plaintiff's position, considering 'all the circumstances.' In same-sex (as in all) harassment cases, that inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target." 523 U.S. at 81 (quoting *Harris*, at 23). Finally, the Court stated that "[c]ommon sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive." *Id.* at 82. Contrary to Petitioner's argument in the instant case, the *Oncale* opinion provides the lower courts with ample "guidance" and "clarity" regarding the standard for an actionable same-sex sexual harassment claim under Title VII.

Petitioner has proffered nothing but his own opinion that, since the Court's decision in *Oncale*, the lower courts lack guidance as to what evidence is sufficient to create an actionable same-sex sexual harassment claim. Even the most cursory review of published decisions in same-sex sexual harassment cases establishes that the lower courts, including the Sixth Circuit, are fully cognizant of the "circumstances under which an employer may be held liable for same sex discrimination and harassment," as set forth in *Oncale*.

For example, the Sixth Circuit, almost one year before issuing the instant decision, properly set forth the requirements for a same-sex sexual harassment claim in *Martin v. Schwan's Sales Enterprises, Inc.*, 1999 U.S. App. LEXIS 31975, *8 (6th Cir. 1999). In that case, the Sixth Circuit *reversed* the district court's grant of summary judgment on five male plaintiffs' same-sex hostile work

environment claims. After acknowledging a cause of action for same-sex sexual harassment under *Oncale*, the Sixth Circuit stated that "[f]or sexual harassment to be actionable, it must be 'sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment.' " *Martin*, 1999 U.S. App. LEXIS at *5 (quoting *Meritor*, 477 U.S. at 67). The Court further recognized that "[t]he analysis has an objective and subjective prong: it must 'create an environment that a reasonable person would find hostile or abusive, and the victim must subjectively regard that environment as abusive.' " *Id.* at *5 (quoting *Black v. Zaring Homes, Inc.*, 104 F.3d 822 (6th Cir. 1997)). Finally, the Sixth Circuit stated that "[a]lthough no bright line test exists to determine exactly when an environment is hostile, the Supreme Court has explained that all the circumstances must be considered and has described factors that might be considered such as the frequency of the conduct and whether it is physically intimidating or simply an offensive utterance." *Id.* at *6.

Applying these well-established principles, the Sixth Circuit determined in *Martin*, that "[the district court's] finding that the conduct did not occur with regularity simply disregards the extensive testimony that the conduct occurred almost daily from the first day of each plaintiff's employment." *Id.* Moreover, the Sixth Circuit found that the lower court "violat[ed] the Supreme Court's directive to look to the 'totality of the circumstances,' " *Martin*, 1999 U.S. App. LEXIS at *7, when the district court "found that there was no proof that the conduct unreasonably interfered with plaintiffs' ability to perform their jobs because they spent most of the time out on the road and not in the presence of [the alleged harasser]." *Martin*, at *6-7. The

Sixth Circuit stated that, "even if the conduct occurred only briefly each day, the continual day-after-day exposure to this type of behavior may interfere with job performance sufficiently to be actionable." *Id.* at *7.

Similarly, in *Lack v. Wal-Mart Stores, Inc.*, 2001 U.S. App. LEXIS 2084, *12-13 (4th Cir. 2001), the Fourth Circuit reversed a jury verdict in favor of the plaintiff, who alleged same-sex sexual harassment in violation of the West Virginia Human Rights Act, where the evidence indicated that the plaintiff was not discriminated against "based upon his sex" as required by *Oncale*. In *Shepherd v. Slater Steels Corp.*, 168 F.3d 998 (7th Cir. 1999), also a same-sex sexual harassment case, the Seventh Circuit recognized that:

> The single question that we need to answer after *Oncale* is a straightforward one: Can one reasonably infer from the evidence before us that the harassment [the plaintiff] describe[d] was discrimination 'because of' his sex? *The Supreme Court has now cleared away much of the doctrinal underbrush that previously vexed courts confronting same-sex harassment claims. There is no longer any doubt that Title VII reaches claims of same-sex harassment. It is also settled that same-sex harassment does not amount to sex discrimination only when it is motivated by sexual desire. And it is clear that the sexual content or connotations of workplace harassment do not automatically render that conduct sex discrimination.* Again, 'the critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.'

Shepherd, 168 F.3d at 1008-1009 (citing *Oncale*, at 79-81; *Harris*, 510 U.S. at 25) (emphasis added). *See also Raum v. Laidlaw Ltd.*, 1999 U.S. App. LEXIS 8219 (2nd Cir. 1999), where the Second Circuit acknowledged that "[u]nder *Oncale*, a plaintiff must allege that the conduct at issue was not merely tinged with offensive sexual connotation, but actually constituted discrimination . . . because of . . . sex. The mere utterance of an . . . epithet which engenders offensive feelings in an employee does not sufficiently affect the conditions of employment to implicate Title VII." *Raum*, 1999 U.S. App. LEXIS at *4 (internal quotation marks omitted).

Thus, there is clearly no confusion on the part of the Sixth Circuit, nor among the Circuits, as to the legal standard for same-sex sexual harassment claims.

B. The lower courts properly applied the standard for an actionable same-sex sexual harassment claim set forth in *Oncale* and did not err in holding that Petitioner failed to establish a genuine issue of material fact as to Petitioner's same-sex sexual harassment claim.

Petitioner here asserts that the lower courts did not permit his same-sex harassment claim to proceed to trial "because of their reluctance to accept same sex sexual harassment claims, failure to properly apply general male/female sexual harassment precedent to the instant same sex harassment claim and because of the lack of any legal precedent dealing specifically with same sex sexual harassment. . . . " [Petition p. 23.] Petitioner's arguments are disingenuous.

There is absolutely no evidence of any such "reluctance" on the part of either the District Court or the Circuit Court. The District Court acknowledged in its opinion that the *Oncale* decision creates a cause of action for same-sex harassment, and extensively quoted this Court's analysis in *Oncale* of the requirements for such a claim. [District Court Mem. Op. and Order, App. B pp. 19a-21a.] The District Court then recognized that, "[i]n *Oncale*, the Supreme Court held that workplace harassment may violate Title VII's prohibition against 'discriminat[ion] . . . because of . . . sex.' 42 U.S.C. §2000e(2)(1), even when the harasser and the harassed employee are of the same sex." [*Id.* at 19a.] The District Court also emphasized this Court's admonishment in *Oncale* that, "[w]hatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted *'discriminat[ion] . . . because* of . . . sex." [*Id.* at 20a (quoting *Oncale*, at 81) (emphasis in original).]

In addition, the Memorandum Opinion clearly reflects the District Court's reliance upon "general male/female sexual harassment precedent" in analyzing Petitioner's same-sex harassment claim. [*Id.* at 17a-19a.] First, the District Court properly stated that "[i]n *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), the Supreme Court held that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment." [*Id.* at 17a.] Continuing its reference to the *Meritor* ruling, the District Court also acknowledged that "[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive

'to alter the conditions of [the victim's] employment and create an abusive working environment.' " [*Id.* at 18a (quoting *Meritor*, at 67).] The District Court accurately referenced in its Opinion the "severe and pervasive" discrimination standard of liability for a sexual harassment that this Court articulated in *Meritor* and reaffirmed in *Harris*. [*Id.* at 17a-18a.] The District Court then quoted the admonition in *Harris* and *Meritor* that "mere utterance of an epithet which engenders offensive feelings in an employee . . . does not sufficiently affect the conditions of employment to implicate Title VII." [*Id.* at 18a-19a (internal quotation marks omitted).] The District Court acknowledged that " '[c]onduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment – an environment that a reasonable person would find hostile or abusive – is beyond Title VII's purview.' " [*Id.* at 19a (quoting *Harris*, at 21).] Further, the District Court quoted what is now commonly referred to as the "totality of the circumstances" test originally set forth in *Harris*. [*Id.*]

After articulating the standards enunciated by this Court for a viable same-sex sexual harassment claim, the District Court then properly applied these standards to the facts of the instant case. First, the District Court determined that "[t]he three comments made by Haywood and Hustead in 1993 [regarding Petitioner's sexual orientation] were isolated and sporadic." [*Id.* at 22a.] With respect to the pornographic literature, the District Court noted that:

> [Petitioner] conced[ed] that [the pornographic and offensive materials allegedly displayed in

> the common work areas] were not displayed in order to harass him. He has offered no evidence that the presence of these materials created a sexually hostile work environment in the machine shop which would have been perceived as such by a reasonable person or that he subjectively perceived them as such.

[*Id.*] Regarding the nude photographs and other offensive materials that were allegedly placed in Petitioner's toolbox, drawer and desk, the District Court acknowledged that this evidence "[came] closer to raising a genuine issue of material fact on the issue of sexual harassment," [*Id.*], but further stated: "however, there is no basis for *respondeat superior* liability inasmuch as the perpetrator or perpetrators are unknown and plaintiff never complained to his employers about this conduct." [*Id.* at 23a.]

Regarding the offensive drawing on Petitioner's computer, the District Court determined that:

> Haywood's August, 1995 drawing of a pair of concentric circles labeled 'Tits' does not either alone, or in combination with any of the other matters [Petitioner] complains of, elevate this case to the status of a litigable sexual harassment claim. Assuming that Haywood intended this drawing to be seen by [Petitioner], it was nothing more than a juvenile, prank [sic]. No reasonable person would have viewed this silly but innocuous drawing as sexually derogatory, hostile, intimidating or offensive.

[*Id.*]

Finally, the District Court determined that, "[c]onsidering the totality of the circumstances, a jury

could not reasonably find that the matters plaintiff complains of as sexual harassment, at least those to which ABB had actual or constructive knowledge, was so severe or pervasive so as to alter the conditions of his employment and create an abusive environment." [*Id.*] The Sixth Circuit agreed. [Sixth Circuit Mem. Op., Appendix A pp. 1a-2a.]

The foregoing establishes that, contrary to Petitioner's assertion, the District Court exhibited its familiarity with both the evidentiary standard for a same-sex sexual harassment claim and the standards of "general male/female sexual harassment precedent."

CONCLUSION

Petitioner presents no reasons for the Court to accept his Petition other than his continuing disagreement with court decisions. This Court considered the issues raised in this Petition during its 1998 term, when it established a cause of action for same-sex sexual harassment, and Petitioner has presented no reasons for the Court to revisit these issues. There is no lower court decision that directly conflicts with the Court's ruling in *Oncale*, including the instant decisions of the District Court and the Sixth Circuit.

Contrary to Petitioner's arguments, the lower Courts properly applied the law and facts to conclude that Petitioner presented insufficient evidence as a matter of law to establish his same-sex harassment claim and those related to it. Therefore, this Petition must be denied.

Dated this 9th day of March, 2001.

Respectfully submitted,

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